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Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights against the State

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NINETEENTH CENTURY INTERPRETATIONS OF THE FEDERAL CONTRACT CLAUSE: THE TRANSFORMATION FROM VESTED TO SUBSTANTIVE RIGHTS AGAINST THE STATE*

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INTRODUCTION

During the early nineteenth century, the contract clause served as the fundamental source of federally protected rights against the state.[1] Yet the Supreme Court gradually eased many of the restrictions on state power enforced in the contract clause cases while developing the doctrine of substantive due process after the Civil War. By the end of the nineteenth century, the due process clause had usurped the place of the contract clause as the centerpiece in litigation about individual rights.

Most analyses of the history of federally protected rights against the state have emphasized the rise of substantive due process to the exclusion of the diminishing significance of the contract clause.[2] As a consequence, explanations for the evolution of rights

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1. Art. I, sec. 10 of the Constitution reads, "No State shall. . .pass any. . .Law impairing the Obligation of Contracts." The standard references upon which I have relied include B. F. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION (1938) and Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512-57, 621-74, 852-92 (1944).

2. *Contra* McGurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism*, 1863-1897, 61 J. AM. HIST. 970 (1974-75). Professor McGurdy discusses Field's contribution to post-bellum contract clause doctrine in the course of showing that "Field's approach to . . . constitutional controversies was more than a narrow philosophy of the bank account. . . . [H]e refused to provide a harbor where refuge can be found for the inconsistent claims of a particularistic interest group." *Id.* at 1004.

against the state generally attempt to account only for the ways in which the late nineteenth century Court expanded upon the constitutional restraints imposed by the Marshall and Taney Courts.

A survey of the cases decided under the contract and due process clauses, however, reveals the late nineteenth century Court permitting exercises of state power previously thought to infringe upon constitutional rights, while limiting state power in ways previously thought unacceptable. Even some of the most "conservative" late nineteenth century Justices urged the reversal of the Marshall Court's most important contract clause precedents, *not* because the fourteenth amendment rendered them unnecessary, but because they had been wrongly decided. An account for the evolution of federal judicial protection for rights against the state should explain this development as well as the rise of substantive due process.

This Article's thesis is that the development and eventual evisceration of contract clause doctrine can be explained by reference to the process by which the substantive right came to displace the vested right as the central concept in legal thought about rights against the state. The doctrines developed under the contract clause were formed by a decision to protect only those property and contract rights that were conceived to have vested against subsequent legislative interference. That decision, about the sort of property and contract rights that were sufficiently "legal" to be protected by judicial review of legislative power, reflected a consensus among the antebellum legal elite on the justiciability of the vested right. In contrast to that consensus was a disagreement about the justiciability of substantive rights, represented by such antebellum luminaries as Marshall, Story, and Kent, which grew more acute with the gradual recognition of the incoherence of the boundary doctrines developed to determine when an individual property or contract right had vested. One consequence of this gradual disintegration was the recasting of protected property and contract rights as substantive rights against the state.

Part I of this Article presents the Marshall Court's major contract clause holdings and summarizes their demise in the late nineteenth century. It then outlines previous explanations of these cases, grounded in the prevalence of beliefs in natural law or positivism and formal or instrumental styles of legal reasoning, and demonstrates their inability to account for the disintegration of

contract clause doctrine. Finally, it sketches an alternative approach which focuses on the changing beliefs in the meaningfulness of the doctrines actually employed by the Court to analyze the cases.

Part II argues that contract clause doctrine was the result of two central decisions: One, the decision to confine judicial review to vested rights, and two, the decision to limit federal jurisdiction over vested rights. It then contrasts this explanation with the alternative explanations.

Part III traces the history of the concept of vested rights. It begins with a statement of the analytics underlying the concept and describes the central distinctions between "rights" and "remedies" and "property rights" and "expectancies" which were employed as boundary doctrines to determine whether a legal interest had vested. It then explains the demise of the vested right in constitutional analysis as the result of the gradual accumulation of a critique of the meaningfulness of the vested right boundary doctrines.

Finally, Part IV relates the unravelling of contract clause doctrine in the late nineteenth century to the collapse of the concept of vested rights. It concludes with a brief suggestion of how this collapse contributed to the protection of substantive rights.

I. THE SHIFT FROM THE CONTRACT CLAUSE TO SUBSTANTIVE DUE PROCESS

A. *The Major Contract Clause Holdings and Their Demise*

The Marshall Court rendered its major contract clause holdings in *Fletcher v. Peck*,[3] *Dartmouth College v. Woodward*,[4] and *Ogden v. Saunders*.[5] In *Fletcher*, the Court invalidated a statute repealing a prior land grant, holding in part that the repealing act impaired a contract embodied in the grant. *Fletcher* was the second case in which the full Court exercised the power of judicial review and the first in which the Court struck down a state statute.[6]

In *Dartmouth College*, the Court invalidated a statute amend-

3. 10 U.S. (6 Cranch) 87 (1810).
4. 17 U.S. (4 Wheat.) 519 (1819).
5. 25 U.S. (12 Wheat.) 213 (1827).
6. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

ing a corporate charter on the ground that the charter embodied a contract whose obligation was impaired by the amendment. In terms of subsequent contract clause cases, the holding of *Dartmouth College* was the most significant, since it established clear federal jurisdiction over the vested rights of corporations.[7]

The Court in *Ogden v. Saunders* held that the contract clause protected only existing contract rights from retrospective invasion and did not protect against regulation of the right to make subsequent contracts. The Court was considering a challenge to a state bankruptcy law and, over a dissent by Marshall, held that the act impaired only those debts incurred prior to its enactment and did not impair debts incurred subsequent to the passage of the act.[8]

By the end of the nineteenth century, each of these holdings had been substantially overruled, as the doctrine of substantive due process came to replace the analysis previously employed under the contract clause. Perhaps the most striking example of the undermining of the analysis adduced in *Fletcher* and *Dartmouth* is the seeming reversal of the Supreme Court's position towards rate regulation between the *Railroad Commission Cases*[9] of 1886 and the *Minnesota Rate Cases*[10] of 1890. While in the former cases the Court held that a corporate charter giving a railroad corporation the power to set reasonable rates did not prohibit the state from later establishing a commission to determine reasonableness of the rates set by the company, in the latter cases, the Court held that the rates set by a railroad commission were subject to federal judicial review under the fourteenth amendment on the evolving theory, brought to fruition in *Smyth v. Ames*,[11] that unreasonable rates violated due process.

Although the Court in the *Railroad Commission Cases* has been viewed as merely applying the doctrine of strict construction of legislative grants (a doctrine traceable to Marshall himself), it is clear that it exhibited an attitude towards the contract clause far removed from that of Marshall's.[12] In *Fletcher*, Marshall had ar-

7. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 519 (1819).

8. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).

9. Stone v. Farmers' Loan & Trust Co. [Railroad Cases], 116 U.S. 307 (1886).

10. Chicago, Milwaukee, & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890).

11. 169 U.S. 466 (1898). The Court in *Smyth* held that the company was entitled to a reasonable return on the fair value of its property.

12. Wright notes that the doctrine of strict construction was suggested by opinions of the Marshall Court and, although it was used by the Taney Court, its effects were not felt

gued that a legislative grant implied a contract not to exercise state power so as to infringe upon the rights embodied in the grant.[13] In the *Railroad Commission Cases*, Chief Justice Waite argued that the railroad's right to set reasonable rates was not protected unless the legislature had also expressly surrendered the power to alter subsequently that right.[14] In dissent, Justice Harlan noted that Waite's reading was strict construction with a vengeance; the Court read the charter as if it had no provision at all for setting rates.[15] The decision laid the foundation for the result in the *Minnesota Rate Cases* and virtually guaranteed that in the future most significant litigation about rate regulation would be brought under the due process clause, where the issue of the reasonableness of the regulation replaced litigation about the scope of the company's chartered rights.

A second example of the disintegration of contract clause doctrine as enunciated in *Dartmouth* is the Court's creation and subsequent application of the doctrine of the inalienable police power. In a series of cases beginning shortly after the Civil War, the Court held that regulations imposed under the police power could override any rights claimed under a corporate charter.[16] In cases in which legislatures had ordered improvements in dangerous conditions associated with various corporate enterprises, the Court increasingly permitted the state to order that improvements be made at the corporation's expense, even in the face of a charter provision arguably exempting the corporation from this kind of liability.[17]

Professor McGurdy has shown how the inalienable police power also seemed to underlie the Court's development of the public trust doctrine with respect to natural resources, a doctrine

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until after Taney's death. B.F. WRIGHT, *supra* note 1, at 63.

13. 10 U.S. (6 Cranch) at 137.

14. 116 U.S. at 330.

15. *Id.* at 341.

16. Stone v. Mississippi, 101 U.S. 814 (1879); Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Beer Co. v. Massachusetts, 97 U.S. 25 (1878); Boyd v. Alabama, 94 U.S. 645 (1877).

17. Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915); Northern Pac. Ry. v. Duluth, 208 U.S. 583 (1908); Missouri *ex rel.* Laclede Gas Light Co. v. Murphy, 170 U.S. 78 (1898); Chicago, B. & Q. R.R. v. Nebraska, 170 U.S. 57 (1898); New York & N. Eng. R.R. v. Bristol, 151 U.S. 556 (1894); New York *ex rel.* N.Y. Elec. Lines v. Squire, 145 U.S. 175 (1892). The Court used the reserved power to amend the corporate charters as an alternative ground for decision in some of these cases.

which amounted to a reversal of *Fletcher*.[18] In *Illinois Central Railroad Co. v. Illinois*, the Court held void a state grant conveying lands underlying navigable waters on the theory that the land was a "public highway" held in trust for the benefit of all users. The Court thus permitted the state to repossess the land despite the charge that the repossession violated the contract clause.[19] In retrospect, the inalienable police power also seems to be the unstated premise of the *Railroad Commission Cases*; although the Court was not willing to hold that the power to regulate rates was part of the inalienable police power, it "construed" corporate charters to achieve a similar result.[20] The inalienable police power doctrine thus assured that most significant regulatory issues would be litigated under the due process clause where the issue became the scope of the police power, and not the extent of the corporation's chartered rights.

A third example of the shift to the due process clause is the Court's treatment of tax exemptions previously protected under the contract clause.[21] As early as 1869, three Justices of the Supreme Court urged the reversal of *New Jersey v. Wilson*,[22] the case in which the Marshall Court had brought tax exemptions within the protective ambit of the contract clause, on the theory that the taxing power was also inalienable.[23] Although the Court never reversed *Wilson*, it "invoke[d] all doctrinal weapons short of reversing" it.[24] The "weapons" included finding that the state had not received consideration for the exemption, construing the exemptions narrowly, and holding them forfeit when a corporation holding an exemption reorganized.[25] As a result, the issue of the scope of the taxing power, like that of the scope of the police power, was litigated under the evolving doctrine of substantive due process.

The decision of *Pearsall v. Great Northern Railway* also cut deeply into the doctrine of the *Dartmouth College* case by holding that an express grant to a corporation of the power to combine and consolidate with other corporations was repealable as long as the

18. McGurdy, *supra* note 2, at 933.
19. 146 U.S. 387 (1892).
20. 116 U.S. at 325-33.
21. *See* the cases collected in B.F. WRIGHT, *supra* note 1, at 179-94.
22. 11 U.S. (7 Cranch) 164 (1812).
23. Home of the Friendless v. Rousse, 75 U.S. (8 Wall.) 430, 443 (1869).
24. McGurdy, *supra* note 2, at 992.
25. B.F. WRIGHT, *supra* note 1, at 179-94.

power remained "unexecuted."[26] Taking his cue from Justice Brown's exhaustive review of the contract clause cases in *Pearsall*, Seymour Thompson, a well known legal commentator and former state court judge, wrote a book about the history of the *Dartmouth College* doctrine in which the main thesis was that the developments detailed above amounted to an inevitable and salutary trend towards the reversal of the holding in that case.[27]

Finally, while loosening the major restrictions on state power imposed by the Marshall Court, the late nineteenth century Court also reversed the major limitation on judicial review of individual rights established in *Ogden*. Commencing with *Allgeyer v. Louisiana*,[28] the Court began to invalidate *prospective* regulations of contracts. The legal protection of the right to enter into subsequent contracts reached fruition in *Lochner v. New York*[29] and *Adair v. United States*,[30] in which the Court held that the due process clause protected against unreasonable regulation the right to make whatever contracts the parties willed.

Developments in late ninetenth century contract clause doctrine thus indicate that by the end of the century the major contract clause holdings of the Marshall Court were well on the way to becoming "judicial relic[s]."[31] In addition, when viewed in the long run, the change in the formal justification for restrictions on state power imposed by the federal courts made a significant impact on the outcomes of the cases. Substantive due process did not merely add to the list of restrictions on legislative power; the ideas which produced the new restrictions also significantly undermined restrictions enforced under the contract clause.

B. *Previous Explanations for the Disintegration of Contract Clause Doctrine*

Insofar as previous explanations of nineteenth century federal judicial review of individual rights focus only on the ways in which substantive due process expanded upon restrictions applied under

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26. 161 U.S. 646 (1896).
27. S. THOMPSON, THE DARTMOUTH COLLEGE CASE (1898).
28. 165 U.S. 578 (1897).
29. 198 U.S. 45 (1905).
30. 208 U.S. 161 (1908).
31. The phrase is C. Peter McGrath's. C.P. MCGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK 109 (1966).

the contract clause, they are seriously imprecise. A survey of the major explanations suggests that this imprecision is more than a matter of omission. An alternative description of the ideas influential in nineteenth century judicial review which accounts for the demise of the limitations enforced under the contract clause, in addition to the growth of substantive due process, challenges a central premise of previous explanations: their common assumption that it is possible to explain the cases by reference to the necessary implications of what modern legal thinkers understand as contradictory beliefs about the nature of law or commitments to incompatible styles of legal reasoning.

The first efforts to account for the evolution of federal judicial protection for rights against the state focused upon prevailing beliefs about the nature of law. Relying on the opposition between a natural law and a positivist jurisprudence, Edward Corwin and Charles Grove Haines described the evolution of federal constitutional restrictions as a continuous struggle between beliefs in natural rights and legislative sovereignty.[32] They attempted to demonstrate a correlation between periods of increased federal protection for individual rights and the scope and intensity of natural rights (higher law) thinking, and a corresponding correlation between less active judicial intervention and the ascendancy of positivist theories of law. They attributed the initial period of contract clause expansion (prior to *Ogden*) and the development of substantive due process to the dominance of natural rights thinking and accounted for the interim period by referring to the rise of Jackso-

32. Major works in this tradition with which I am familiar include E.S. CORWIN: THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955) [hereinafter cited as "HIGHER LAW" BACKGROUND]; LIBERTY AGAINST GOVERNMENT (1948) [hereinafter cited as LIBERTY AGAINST GOVERNMENT]; THE TWILIGHT OF THE SUPREME COURT (1934) [hereinafter cited as THE TWILIGHT OF THE SUPREME COURT]; *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914) [hereinafter cited as *Basic Doctrine*]; *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 440 (1911) [hereinafter cited as *The Doctrine of Due Process*]; *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643 (1909) [hereinafter cited as *The Supreme Court and the Fourteenth Amendment*]; and C.G. HAINES: THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (1932) [hereinafter cited as AMERICAN DOCTRINE]; THE REVIVAL OF NATURAL LAW CONCEPTS (1930) [hereinafter cited as REVIVAL]; THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835 (1960) [hereinafter cited as ROLE OF THE SUPREME COURT]. For statements conceptualizing the conflict between legislative sovereignty and natural rights, see LIBERTY AGAINST GOVERNMENT, *supra*, at 59-68; REVIVAL, *supra*, at 80-86; ROLE OF THE SUPREME COURT, *supra*, at 9-49; *Basic Doctrine*, *supra*, at 247.

nian democracy and the ascendancy of theories of legislative sovereignty.[33]

More recently, scholars writing in this tradition have begun to revise the version of the conflict between natural law and positivism employed by Haines and Corwin. Responding to increasing evidence that early nineteenth century legal thinkers took seriously the theory that judicial enforcement of written constitutions was consistent with popular sovereignty, Professors Tribe and Ely reconceptualized the jurisprudential conflict as between natural law and constitutional positivism.[34] The concept of constitutional positivism views judicial protection of certain individual rights as fully consistent with democratic theory. Hence, active judicial review of at least some individual rights is not necessarily attributed to beliefs in natural law.

Ely argues that constitutional positivism comprises "interpretivism," the protection of rights expressly stated in the text, plus the protection of the democractic process through the enforcement of rights ensuring relatively equal "access to the processes and bounty of representative government."[35] In opposition, conceptions of natural law include protection for certain rights denominated by the courts as fundamental.[36] Ely invokes these concepts to argue that the early contract clause cases are not attributable to natural law theories at all; instead, he argues that they are fully consistent

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33. Chapter II of TWILIGHT OF THE SUPREME COURT, *supra* note 32, *The Property Right versus Legislative Power in a Democracy*, contains a succinct statement of Corwin's argument. For a summary of Corwin's work, see Mason & Garvey, *Introduction* to E.S. CORWIN, AMERICAN CONSTITUTIONAL HISTORY (1964). Haines' argument appears in REVIVAL, *supra* note 32, at 75-165 and in ROLE OF THE SUPREME COURT, *supra* note 32, at 323-29, 579-90, 623-30.

34. J.H. ELY, DEMOCRACY AND DISTRUST (1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978). Two recent accounts of the ways in which early nineteenth century legal thinkers incorporated the idea of constitutional restrictions into positivist theories of law are G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); and Nelson, *Changing Conceptions of Judicial Review in the States*, 1790-1860, 120 U. PA. L. REV. 1166 (1972). Although Corwin noted that the written Constitution was associated with popular sovereignty, he argued that natural rights theories governed the Court's interpretation of the written Constitution. In discussing the famous exchange between Justices Chase and Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), Corwin asserted that the victory for Iredell's position on the illegitimacy of appealing to restrictions not expressly stated in the text was a purely formal one which disguised a substantive victory for the natural rights theorists. LIBERTY AGAINST GOVERNMENT, *supra* note 32, at 59-64.

35. J.H. ELY, *supra* note 34, at 74.

36. *Id.* at 1-9, 48-54, 73-75.

with judicial beliefs in constitutional positivism.[37] Ely then portrays late nineteenth century substantive due process as attributable to a desire on the part of judges to protect fundamental values—a procedure whose legitimation, at least in the context of the time period, depended upon an underlying jurisprudential belief in natural rights.[38]

Tribe offers a more complex explanation. He argues that the earliest contract clause cases evidenced a desire to protect vested economic rights independent of textual basis. Nonetheless, by 1830 (again *Ogden* seems to provide the dividing line) the Court had settled on an interpretation of the contract clause largely consistent with constitutional positivism.[39] Tribe argues that the antebellum court for the most part assumed that the division and separation of powers provided sufficient protection for individual rights and that the continuation of contract clause protection after *Ogden* represented only a minimal concession to natural rights thinking embodied in what he calls the model of "settled expectations."[40] Tribe then depicts an upsurge in natural rights theories

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37. Ely argues that Marshall's opinion in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), is consistent with constitutional positivism. J.H. ELY, *supra* note 34, at 209-11 n.41. Since this opinion had previously been interpreted as containing Marshall's most explicit statement of his natural rights philosophy (*see, e.g.*, Issac, *John Marshall on Contracts: A Study in Early American Juristic Theory*, 7 U. VA. L. REV. 413 (1921)), the implication is that all the Marshall Court's contract clause cases can be accommodated within the model of constitutional positivism. Ely concludes:

> [F]or early American lawyers, references to natural law and natural rights functioned as little more than signals for one's sense that the law was not as one felt it should be. This is not to say that "natural law" was without perceived legal significance. It was thought to be invocable interstitially, when no aspect of positive law provided the applicable rule for the case at hand. But it was subordinate to applicable statutes and well-settled precedent as well as to constitutional provisions, and not generally perceived as a source of values on whose basis positive law could be constitutionally upset.

J.H. ELY, *supra* note 34, at 50.

38. J.H. ELY, *supra* note 34, at 14-21, 228 n.91, 213 n.66.

39. Tribe writes, "[i]n these early nineteenth century [contract clause] cases, the Supreme Court was less concerned to locate the protection of vested economic rights in a particular clause of the Constitution than to define such rights and to defend them in the name of the fundamental law. . . ." L. TRIBE, *supra* note 34, at 456-57. Tribe then depicts Marshall's defeat in *Ogden* as a defeat for his theory that contractual obligations arose "prior to the social compact itself." *Id.* at 467. He attributes the early cases to a "breathing space" between the 1780s when "colonial legislation had slipped from its early Seventeenth century pinnacle as the expression of reason" and the late 1820s when "adjudication joined legislation in the subjective pit of will and power." *Id.* at 11.

40. Tribe argues that in applying the contract clause after *Ogden*, the Court did not

after the Civil War, the effect of which was finally felt as substantive due process when the Court developed a model of "implied limitations," with no substantial basis in the Constitutional text, which did not threaten prevailing views of federalism.[41] Despite his use of the concept of constitutional positivism, Tribe's picture of the impact of the ebb and flow between the opposing theories of law in the cases is strikingly similar to that of Haines and Corwin.

These interpretations of the relationship between the outcomes of the individual rights cases and prevailing beliefs in natural law or positivism fail to account adequately for the rise of substantive due process and the parallel demise of the contract clause. Haines and Corwin portray the shift from the contract clause to substantive due process as reflecting a judicial desire to seek a "more secure anchor for individual rights" after the contract clause had been restricted during the positivist period or as illustrating a judicial attempt to construct further limitations upon state power.[42] Neither explanation, however, accounts for the diminishing solicitude for the restrictions on state power previously enforced under the contract clause. Similarly, Tribe's explanation of both the early contract clause cases and the substantive due process cases as traceable to natural rights theories leaves unexplained why the later Court dismantled rather than reinvigorated Marshall's handiwork. If the model of settled expectations represented a minimal concession to natural rights thinking and the later model of implied limitations was a full-blown natural rights theory, it is not clear why the latter replaced, rather than supplemented, the former.

Ely's emphasis on interpretative and non-interpretative models, while perhaps useful in the ongoing normative debate about the proper constitutional theory, is far too broad to account for the developments described above or even for the outcomes observed in either period. For instance, Ely argues that Justice Johnson's concurrence in *Fletcher*, appealing to a "principle which will im-

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follow fully a positivist theory of the obligation of contracts. Instead of protecting only the rights parties to an agreement would expect under the positive law, the Court protected rights it thought the parties were entitled to expect. *Id.* at 467-69.

41. *Id.* at 415-22, 427-34.

42. *Basic Doctrine*, *supra* note 32; AMERICAN DOCTRINE, *supra* note 32, at 403-10; REVIVAL, *supra* note 32, at 88-95, 99-103.

pose laws even on the Deity,"[43] is an example of the unaccepted mode of natural rights thinking.[44] Yet, it was Johnson himself who cast the deciding vote in *Ogden*, spelling an end to the period of contract clause expansion. Similarly, the Court in *Terret v. Taylor*, a case later conceived as having been decided under the contract clause, proceeded without any textual rationale at all.[45] Finally, many of the theorists whose work contributed significantly to the rise of substantive due process professed to eschew natural rights theories of judicial review in favor of a theory which permitted only the "interpretation" of constitutional restrictions.[46] In general, therefore, Ely's version of constitutional positivism is so broad that it does not tell us very much about the ways the outcomes of the cases might be related to prevailing beliefs about the nature of law.

Recognizing the difficulties in connecting the outcomes of the cases with prevailing conceptions of law, a second group of modern scholars has sought explanations in judicial commitments to competing modes of legal reasoning. Using the concepts of a formal versus an instrumental style of legal reasoning, Professors Horwitz and Nelson have begun to reexamine changes in the substantive law from the point of view of their relationship to the prevailing styles.[47] Employing the formal style, a judge conceives himself as "declaring the law" by deducing particular rules from "first principles of morality" or from the true fixed principles which underlie the prior precedents.[48] In contrast, a judge reasoning in the instrumental style conceives himself to be "making the law" according to

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43. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 143 (1810).

44. J.H. ELY, *supra* note 34, at 211.

45. 13 U.S. (9 Cranch) 43 (1815).

46. *See, e.g.*, T.M. COOLEY, A TREATISE ON THE LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES IN THE AMERICAN UNION (1868); C. TIEDMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES (1886).

47. Works in this vein with which the author is familiar include M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); W.E. NELSON: AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978) [hereinafter cited as *Constitutional Jurisprudence*]; *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974) [hereinafter cited as *Antislavery Jurisprudence*].

48. M. HORWITZ, *supra* note 47, at 1, 30; *Antislavery Jurisprudence*, *supra* note 47, at 516, 548.

an explicit consideration of the effects of legal rules upon social life.[49]

Nelson and Horwitz conclude that the periods characterized by the instrumental and formal styles correspond roughly to the periods cited by Corwin, Haines, and Tribe, although both see early nineteenth century judges exhibiting tendencies towards both styles.[50] They portray early nineteenth century opinions as distinguished by the emergence of an instrumental style which achieved dominance at the end of the 1820s, only to begin a protracted period of breakdown resulting in late nineteenth century formalism.[51] Horwitz and Nelson link periods of active protection for individual rights with the tendency of judges to engage in formalist reasoning and periods of passive protection for individual rights with the tendency to engage in instrumental reasoning. The underlying notion seems to be that the formal style obscures the political element in judicial review, and the judges' propensity to intervene in the political process can be explained, in part, by the extent to which they believe they can draw a plausible distinction between legal and political reasoning.

Horwitz further suggests that early and late nineteenth century formalism in the individual rights cases reflected an attempt by judges to "freeze" certain legal rules against legislative change—rules that operated to the benefit of the commercial classes.[52] Nelson attributes early nineteenth century formalism to an attempt to protect a substantive consensus about individual rights from the political process. He envisions Marshall and others attempting to "reduce the areas of consensus they observed to an analytically rigorous category of rights subject to legal protection."[53] He has yet to attempt to account for the motivations be-

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49. *Id.*

50. M. HORWITZ, *supra* note 47, at 30, 256, 259-60; *Antislavery Jurisprudence*, *supra* note 47, at 519; *Constitutional Jurisprudence*, *supra* note 47, at 955. Horwitz and Nelson agree on the formalist cast of early contract clause cases. Horwitz argues that the formalism of these opinions stands in stark contrast to the explicit policy orientation of the early common law cases. M. HORWITZ, *supra* note 47, at 255-56. Nelson argues that the early contract clause cases exhibit an awareness of both styles, and that judges intervened only when they thought the issue sufficiently "legal" to bear resolution by formalistic analysis. Instrumental or policy concerns were left to the political branches. *Constitutional Jurisprudence*, *supra* note 47, at 944-56.

51. *See supra* notes 47-50 and accompanying text.

52. *See* M. HORWITZ, *supra* note 47, at 255, 259.

53. *Constitutional Jurisprudence*, *supra* note 47, at 936.

hind late nineteenth century formalism, except to show its roots in anti-slavery and scientific thought.[54]

Insofar as Horwitz and Nelson argue that a correlation exists between the prevailing styles and the outcomes in the constitutional cases, the results of the research into formalism and instrumentalism seem to mirror those revealed by the inquiry into prevailing conceptions of law. Early contract clause cases and later substantive due process cases are traced to a formal style; the intervening instrumentalist period corresponds to the Supreme Court's halt to the expansion of the contract clause.

The same criticism which applied to attempts to relate the outcomes of the cases to prevailing conceptions of law applies to attempts to explain the developments as the result of prevailing styles of legal reasoning. Formalism, in the early and late nineteenth century, worked first for, then against the kinds of rights the Court protected under the contract clause. In the process of deducing rights from "first principles of morality" or from the "fixed principles underlying prior cases,"[55] late nineteenth century judges vastly restricted the import of the Marshall Court's contract clause doctrines.

The attempts to correlate the outcomes of the individual rights cases with beliefs about the nature of law or commitments to styles of legal reasoning thus do not seem to get much beyond an observed tendency of the judges to restrict the political process during periods marked by the prevalence of natural rights thinking or formal legal analysis. This broad tendency may have in fact resulted from an increased faith in "reason" as a source of individual rights which accompanied beliefs in natural law or formal analysis. Nonetheless, this broad tendency leaves unexplained why the doctrines developed by the Marshall Court fell into disfavor in the late nineteenth century.

The attempts to explain the patterns of outcomes observed in the individual rights cases in the nineteenth century by referring to prevailing styles of legal reasoning or conceptions of law share a common problem. In order to attribute the cases to formalism, instrumentalism, positivism, or natural law, the historian must adopt

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54. Nelson has not yet undertaken to demonstrate the "impact of reasoning style on substantive results." *Antislavery Jurisprudence, supra* note 47, at 515 n.12.

55. M. HORWITZ, *supra* note 47, at 1, 30; *Antislavery Jurisprudence, supra* note 47, at 516, 548.

the judges' perceptions of the implications of these beliefs. Even if we acknowledge that periods of American law are distinguished by the prevalence of these characteristic commitments, the evidence from the nineteenth century suggests that there were no necessary implications of beliefs in either conception of law or style of legal reasoning specific enough to account for the cases. Although the normative theorist who seeks to prove that a style of legal reasoning or a conception of law is always the best approach must argue for some necessary implications of one approach or the other, the evidence available to us about changes in the character of individual rights against the state in the nineteenth century indicates that there were no such constants throughout the century.

The critique developed above also has implications for the various interest analyses that have typically accompanied intellectual explanations of the trends in the individual rights cases. The earlier theorists emphasized the Court's protection of "private property" against legislative majorities. Haines and Wright argued in this vein.[56] For Wright, the early Court made the "contract clause a mighty instrument for the protection of the rights of property"[57] and the later Court made the due process clause a haven for "extreme *laissez-faire* philosophy."[58] For Haines, "[t]he two leading events which weakened the government and correspondingly expanded the rights and immunities of property holders were the *Dartmouth College* case and the adoption of the 'due process clause' of the Fourteenth Amendment in 1868."[59]

Despite the evidence of constant concern on the part of nineteenth century judges for the institution of private property, it is clear that this concern was manifested in different ways in the early and late parts of the century. The desire to protect "private property" is too broad to provide an explanation for the cases. It leaves unanswered the question of why the later Court felt it necessary to undermine the doctrines that the Marshall Court supposedly created for the same purpose. Thus, the notion that individual rights cases throughout the century can be explained by the desire to protect private property fails to account for the apparently different conceptions in each period about the constitutional restric-

56. *See also* R. McCLOSKEY, THE AMERICAN SUPREME COURT 71-77, 127-35 (1960).
57. B.F. WRIGHT, *supra* note 1, at 28.
58. B.F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 254-55 (1967).
59. ROLE OF THE SUPREME COURT, *supra* note 32, at 418.

tions thought to be legitimately derived from a regime of private property.

A similar problem arises with attempts to explain the cases as reflecting the "requirements of economic growth" or the "needs of an expanding capitalist economy."[60] Indeed, recent explanations of this type have seemed to abandon the notion that there were objective requirements or needs of the economy which governed the outcomes of the cases. Instead, emphasis has been placed upon changing conceptions of what those needs or requirements were. The crucial insight, for example, of Horwitz's *Transformation of American Law* is that precisely because there were no such objective requirements, one can observe how the adoption of one alternative path to economic growth involved the sacrifice of the interests of some groups in society to those of others.[61] Similarly, although McGurdy intimates that late nineteenth century legal doctrine adjusted to the "needs of an ever expanding capitalist economy," he seems to argue that these needs were not objective in any sense.[62] Instead, he concludes that the doctrine was indicative of the "ideological commitments of post-war Americans."[63] Indeed, it would be difficult to argue that the late nineteenth century Court, which rejected demands for constitutional protection of tax exemptions, land grants, compensation for safety improvements, and the right to consolidate and combine, somehow knew the "needs of capitalism" better than the capitalists themselves.[64]

An explanation for the individual rights cases decided by the nineteenth century Supreme Court, then, should attempt to account for the diminished protection for the kinds of rights typi-

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60. An example of an analysis of this type, although in the context of the development of common law rules in the nineteenth century, can be found in Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

61. M. HORWITZ, *supra* note 47, at xv, 99-101.

62. McGurdy, *supra* note 2, at 988, 1005.

63. *Id.*

64. The tendency, at least in the writings of some modern Marxist theorists, has been to argue that law serves capitalism only to the extent that it does *not* respond instrumentally to the needs of identifiable actors in the capitalist economy. *See, e.g.*, Balbus, *Commodity Form and Legal Form: An Essay on the Relative Autonomy of the Law*, 11 LAW & SOC'Y 571 (1977). Balbus argues that the only necessary link between legal development and capitalism is the maintainence of a legal system itself. If Balbus is correct, then it is obviously futile to analyze the substantive law for the ways in which it impeded or promoted capitalism. In Balbus' account, the outcomes of *all* the cases, insofar as they were outcomes of a legal system, promoted capitalism. *Id.*

cally protected under the contract clause while accounting for the growth of substantive due process. Nothing in the analysis developed above questions the attempt to examine in greater detail the identity of groups which perceived changes in the substantive law to be in their interest and sought to obtain judicial support for those interests. Nonetheless, even those currently writing legal history in this mode suggest that it is necessary to seek some kind of intellectual explanation for the outcomes of the cases. Horwitz and Thompson, for instance, argue that it is not always possible, and indeed sometimes wrong, to explain changes in legal doctrine by inferring judicial motivation to favor the groups whose interests, in retrospect, were promoted by the substantive law.[65] Even if judges think explicitly about the social effects of their decisions, it is acknowledged that they often perceive the interests implicated by various legal rules through a "filter" which separates "legitimate" from "illegitimate" interests according to some set of ideas which reflects their perceived duty to uphold a "rule of law."[66] Such an acknowledgment is of course not inimical to interest analysis; it merely posits the existence of at least one group in society (the legal elite) and perhaps others which perceived the maintenance of the idea of the "rule of law" as being in their interest.[67]

The method used in this Article to explain developments under the contract clause will attempt a reconstruction of the shifting conception of constitutionally protected individual rights which accompanied the rise of the contract clause and its eventual

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65. Horwitz notes that much of the redistribution of wealth that accompanied the transformation of private law rules in the nineteenth century may well have been "inadvertent." M. HORWITZ, *supra* note 37, at 256. Thompson notes that even if law is viewed as an ideological mask for class power, it can not fulfill that role without being at least partially independent of class manipulation.

> The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.

E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 263 (1975).

66. The efforts to explain the outcomes of the cases as in part the result of commitments to styles of legal reasoning and conceptions of law seem to be attempts to discover the filters through which the judges sorted out the demands of the litigants. The criticism of these arguments is not an attempt to undermine the idea that such filters exist; it is intended as a prelude to developing a more accurate picture of the ways in which ideas influenced the judges' formulation of the substantive law.

67. M. HORWITZ, *supra* note 47, at xiii.

demise in the face of the doctrine of substantive due process.[68] The attempt will require the reconstruction of the actual doctrinal categories used by the Court to decide cases involving individual rights against the state in the nineteenth century. The premise is that by analyzing the categories used by the Court to legitimate federal judicial protection for rights against the state, one can in part explain why the Court decided the cases the way it did, even if better links between the actual outcomes and the interests of various groups are discovered at a later point.

C. *An Alternative Approach*

This account for the trends in the contract clause cases will draw upon the concepts of vested and substantive rights as they were developed by legal thinkers in the nineteenth century. Although both concepts remain part of modern legal discourse, it has been rare, until perhaps very recently, for the outcome of a *constitutional* case to depend upon whether an individual right was "vested."[69] The theory of vesting has been confined almost entirely to the interpretation of rules (such as the rule against perpetuities) acknowledged to be the product of an arcane and bygone era, but necessary due to decades of reliance. Similarly, although the notion of substantive rights does have constitutional importance today, it is almost always discussed in opposition to procedural and not vested rights.

Modern uses of the concepts of substantive and vested rights distort the significance they had when they were opposed to each other in nineteenth century legal thought. The basic distinction between a vested and substantive right against the state was perceived as that between a right which one had by virtue of a standing legal rule recognized by the legislature and a right which one had independent of previously defined legal rules.

The legislative "recognition" of a standing legal rule necessary for the right to vest was a complex notion evidenced either by a previously enacted statute or by inaction in light of an established common law rule. Under the regime of vested rights against the

68. The method employed herein owes much to Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 209-21, 362 n.59 (1979).

69. The theory underlying the Court's recent resurrection of the contract clause is entirely unclear. *See, e.g.*, Note, *A Process-Orientated Approach to the Contract Clause*, 89 YALE L.J. 1623, 1624-25 (1980).

state, therefore, the definition of legal rights in the first instance was an acknowledged political, hence ultimately legislative, function. Rights restricting the legislature's power accrued only when an individual acted under the standing law. Thus every violation of a vested right was conceived to result from the retrospective application of a rule which did not exist at the time the individual's right had vested.[70] In contrast, under the regime of substantive rights against the state, the content of the rules which the legislature could enact was openly restricted. It was the substance of the rule *simpliciter* (its "unreasonableness") which offended the right and not the manner in which it was applied (to actions performed prior to the enactment of the offending statute).[71]

Although there is nothing new in identifying the importance of the doctrines of vested rights and substantive due process, their significance in early and late nineteenth century legal thought has tended to be overlooked in the attempt to analyze them as surrogates for ideas which are more readily accessible to modern legal thought. For example, although noting that *Ogden* prevented the interpretation of the contract clause to protect "liberty of contract" as later conceived under the due process clause, Wright nonetheless concluded that the transition from the contract clause to substantive due process reflected an "incident in the continuous development" of the "protection of vested rights in a democracy."[72] Employing the modern perspective, Wright sees the concept of vested rights as interchangeable with substantive due process—a perspective itself an artifact of the disillusionment with the boundaries of judicial review established by the concept of vested rights. Wright therefore employs the term vested rights to signify any property interests and suggests that the cases can be explained in terms of the degree of protection provided for private property. This sort of account ignores important changes in legal thought that affected the plausibility of various outcomes in the early and late nineteenth century.

The focus on the changing conception of individual contract

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70. All laws conceived as retrospective, however, were not understood to divest vested rights. *See infra* notes 88-90 and accompanying text.

71. From the nineteenth century perspective, then, the typical modern constitutional right, *e.g.*, the right to free speech, is substantive in the same sense as was liberty of contract.

72. B.F. WRIGHT, *supra* note 1, at 243, 258-59.

and property rights as vested or substantive offers an alternative account of the ideas shaping the history of contract clause jurisprudence. These ideas concern a changing conception of the legitimacy of judicial review of individual rights which is not captured in the histories which focus on changing judicial beliefs in natural law, positivism, formalism or instrumentalism. The concepts of vested and substantive rights reflected the characteristic mode of rationalizing judicial protection of individual rights as the maintenance of determinate boundary doctrines which distinguished between legitimate judicial enforcement of individual rights and the illegitimate usurpation of a legislative function. In this sense, typical early and late nineteenth century judges who could be classified as practitioners of either a formal or instrumental style of legal reasoning or as believers in either a natural or positive jurisprudence shared less with each other than with their contemporary counterparts when deriving the implications of either style or theory for federal judicial protection of rights against the state. What *was* shared in each era was a conceptual structure used to "solve" the problem of the judicial role in individual rights cases, the most prominent feature of these cases being alternatively, the concepts of vested and substantive rights.

Moreover, it appears that this shared sense of the justiciability of vested or substantive rights mediated between the opposed modes of reasoning *politically* about conflicts between state power and individual rights embodied in natural law theory, positivism, formalism, and instrumentalism. The historical importance of vested and substantive rights lies in their enabling judges to believe that they were enforcing individual rights without confronting the contradictions of political and moral theory that would have destroyed their sense of enforcing *legal* rights against the state. The modern sense of the inevitability of "balancing," and hence of judicial legislation, is a direct descendant of the process by which these concepts were revealed to reproduce the contradictions that they were once thought to ameliorate.

This Article describes the process by which the legal elite came to view as incoherent the boundary doctrines used to reason about when a right had vested and offers this description as an explanation for why the shift from vested to substantive rights occurred. Although the focus will be on the internal evolution of legal thought about rights against the state, the argument is not meant

to disconnect this development from the changing character of American social life or the triumph of particular economic or social interests. At least part of that story, however, is embedded in the development and destruction of the categories of legal thought which reflected the legal elite's understanding of its role in contributing to the character of American social life through judicial review of individual rights in the early and late nineteenth centuries.

A description of the history of the displacement of the vested right by the substantive right in constitutional analysis cannot account for the outcomes of particular cases except in the long run. The constant presence of disagreements about how to apply a shared analysis precludes more precise explanation. More importantly, however, the history of these concepts in legal thought *is* the history of the gradual recognition of the incoherence of these notions—the gradual realization that the concepts failed to mediate between opposing claims in a way that made it possible to believe that judicial protection of individual rights was law and not politics. It is therefore impossible to attribute the outcome of any but a very few cases to either the concepts of vested or substantive rights, other than by noting the different styles of review characteristic of each era. Nonetheless, this does not vitiate the observation that the constitutional arguments of the early and late nineteenth century were about whether a party had a vested or substantive right against the state, and that the examination of the development and demise of these concepts can explain how changes in legal thought impacted on results over the long run.

In particular, the transformation from vested to substantive rights offers an explanation of the decisions undermining the restrictions previously enforced under the contract clause which parallelled the rise of substantive due process. While protecting individual contract and property rights throughout the nineteenth century, the Court alternatively conceived its role through the legal concepts of vested and substantive rights. As the framework for legitimating the judicial role based on the latter conception achieved dominance, many judges viewed even the most important contract clause doctrines as misconceived. To the extent that those doctrines made sense only as protections for vested rights, they appeared to judges with a different conception of their role as either arbitrary or in need of an alternative rationale. For example, to judges for whom the issue of economic regulation had become a

question of the substantive limitations on the exercise of the police power required to protect substantive rights, an inquiry into the vested rights of corporations under their charters seemed, at best, a separate form of protection for a distinct and subordinate reliance interest or, at worst, a grievous example of the Court engaging in corporate favoritism.[73]

Before proceeding further, it seems necessary to confront the persistent nominalist critique one encounters when one proposes to use doctrinal categories to help explain the outcomes of cases. An underlying theme in legal historiography, at least since the advent of sociological jurisprudence and legal realism, seems to be that it is impossible to use legal doctrine to explain the outcomes of cases because the categories it contains exist "only" as creations of the judges' minds.[74] The decision of a judge can never be said to "follow from" the categories; under the veneer of doctrine, the judge was actually deciding a policy question involving a choice between competing values.[75] Doctrinal categories are thus meaningful to the historian only to the extent that they serve as surrogates for what are viewed as more fundamental ideas (*i.e.*, about the nature of law or legal reasoning) or social interests. Beyond their relationship to more basic attitudes or beliefs, doctrinal categories can be safely ignored.

One of the salutary effects of the critique of legal concepts was the end of legal history which simply portrayed judges as deciding cases correctly or incorrectly under the law. Nonetheless, it seems

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73. Late nineteenth century judges responsible for the most limited reading of the police power when opposed to a substantive right were also often responsible for its broadest reading when opposed to a vested right. On Justice Field, see McGurdy, *supra* note 2, at 983. Justice Pitney serves as a similar early twentieth century example. *Compare* his opinions in Chicago Alton R.R. v. Tranbarger, 238 U.S. 67 (1915) and Coppage v. Kansas, 236 U.S. 1 (1915).

74. For an example of extreme nominalism in American legal thinking, see Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). On the nominalism of the American legal realists, see Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 443 (1934).

75. For an example of this approach to legal reasoning by an American legal historian, see L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973).

> This book treats American law, then, not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. This is the theme of every chapter and verse.

Id. at 10.

entirely possible to inquire into the ways in which the actual doctrinal categories employed by judges to demonstrate the legitimacy of the outcomes actually *influenced* the outcomes, at least in the long run. To argue that the judges were influenced by the prevailing categories does not reproduce the formalist error. Saying that part of an explanation for why a judge thought a particular decision consistent with the law can be found in the doctrinal categories he used to justify the decision is not the same thing as saying that the decision necessarily "followed from" an analysis of "the law."

The use of the formal rationale employed by the Court as at least a partial explanation for the outcomes of the cases rests upon two observations. First, despite the malleability of legal concepts, their creation, criticism, alteration, and eventual destruction is a process of social persuasion involving the joint activity of judges, lawyers and commentators whose ordinary discourse does not proceed on the premise that legal categories are infinitely manipulable or are mere surrogates for other, more fundamental, ideas or interests. Second, the process of doctrinal creation and disintegration occurs through time and is therefore structured by the categories inherited from the past. It is a common experience for even Supreme Court Justices to feel bound, and part of this feeling of "boundness" seems attributable to the inherited ways of categorizing the incredibly broad range of social phenomena which judges are called upon to imbue with legal significance.[76] Of course, judges are never wholly bound; categories are criticized, refined, and discarded. Also, social events do not appear labelled as exercises of the police power or as interferences with freedom of contract. Judges obviously exercise choice in placing events within one or another of the categories. The acknowledgment of the role of choice in creating and employing the categories, however, does not undermine the insight that what was experienced by the judges as constraints on their behavior, imposed by their duty to decide under the law, was reflected in the "settled law" of the age— the set of categories, rules and tests which appeared to the legal elite to order social phenomena in a way that "made sense."

Despite the ultimately contingent nature of the categories, they do have a determinate history which provides a way to dis-

76. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 102-03 (1921).

cover the structure of possibilities available to judges in deciding the individual rights cases at different moments in the nineteenth century. Of course, reconstructing the legal categories used to decide the cases will never explain exactly why a case was decided the way it was; the malleability of the categories themselves and the process by which events were placed within them means that the Court was always free to decide other than it did. Yet, in looking at the ways in which the nineteenth century legal elite developed different categories for structuring individual rights cases before the Supreme Court over the course of the century, one can discern changes that account for the development and demise of contract clause doctrine and the growth of substantive due process without encountering the kinds of problems one confronts when attempting to analyze these trends as outgrowths from beliefs in formalism, instrumentalism, natural rights, or positivism. Changes in conceptions of law or in styles of legal reasoning are ultimately changes in ways of thinking *about* the categories (their origin or the nature of their interrelatedness); changes in the characteristic doctrines reflect changes in the categories themselves. What follows will be an explanation for the trends in contract clause and due process clause cases that will draw upon the notion of a changing "legal consciousness" reflected in the doctrinal categories developed to analyze cases under the two clauses.

II. Antebellum Rights Against the State

A. *The Decision for Vested Rights*

The antebellum Court's conception of the federal judicial role in enforcing rights against the state was dictated by its decision to protect only what were conceived of as vested rights against the state and its rejection of the protection of substantive rights as "too political" for judicial determination. This section traces that decision through the early contract clause cases and discusses how this perspective differs from previous explanations of antebellum legal thought.

The contract clause cases preceding *Ogden v. Saunders*[77] posed the question of whether federal judicial review could legitimately enforce vested or substantive rights. This question emerged

77. 25 U.S. (12 Wheat.) 213 (1827).

as the central issue in *Ogden* only after Chief Justice Marshall made explicit his attempt to define the judicial role to comprise the protection of substantive rights.[78] The Court's rejection of Marshall's attempt to interpret the contract clause to protect against infringements upon subsequent contracts (the right to contract) brought to the surface an assumption about the illegitimacy of enforcing substantive rights against the state that had been implicit in the earlier cases: the parameters of the concept of vested rights defined the parameters of individual rights issues amenable to purely legal solutions.[79] Although Marshall's defeat occasioned the only overt statement of this assumption, judicial review of individual rights reflected the decision to protect only vested rights until well after the Civil War.

In *Fletcher v. Peck*,[80] the first case in which the full Supreme Court applied the contract clause, the Court invalidated a Georgia statute repealing a previous land grant. In his opinion for the Court, Marshall reasoned that since the right infringed by the repealing act had vested, it was beyond the power of the legislature to "divest":

> The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights. . . .[81]

In a concurring opinion, Justice Johnson advanced a similar argument. Noting that a ruling contrary to the Court's could have been supported "only. . .upon the ground that no existing legislature can abridge the powers of those which will succeed it," Johnson also gave this principle only a qualified endorsement:

> To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil. The right of

78. *Id.* at 353-54.
79. *Id.* at 285.
80. 10 U.S. (6 Cranch) 87 (1810).
81. *Id.* at 135.

> jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. . . .But it is not so with the interests or property of a nation. . . .When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system.[82]

The best picture we have of the legal elite's understanding of the concept of vested rights reflected in *Fletcher* comes down to us through Thomas Cooley's *Treatise on the Constitutional Limitations Which Rest on the States of the American Union* and Theodore Sedgwick's *Treatise on Statutory and Constitutional Construction.*[83] Summarizing the antebellum legal wisdom, both argued for a unified judicial role in the protection of individual rights against the state whether they were discussing express protections for individual rights, such as the contract clause or the states' due process and law of the land clauses, or the implications for the protection of individual rights that could legitimately be derived from the "nature of republican government."[84] Their presentations of the distinguishing features of that role revealed their understanding of the common character of the choices entailed by the protection of vested rights.

Central to both Sedgwick's and Cooley's expositions was their argument that the entire corpus of decisions defining vested rights reflected the exercise of a form of legal reason that was particularly appropriate to the judicial function. The idea was that the definition of vested rights entailed a class of choices about the *application* of legal rules, as opposed to their substance, that fell within the undisputed province of legal reasoning. The analogy was to maxims governing statutory interpretation, or occasions upon which equity would mitigate the technicality of the common law, and not to substantive common law rulemaking power over which the legislature had ultimate authority. Their conclusion, therefore, was that the concept of vested rights defined the legitimate bound-

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82. *Id.* at 143.

83. T.M. COOLEY, *supra* note 46, at chs. V, IX & XI; T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW, ch. V (1857). Page citations to SEDGWICK are to the 2d edition, edited by J. Pomeroy, 1874. All references are to the text which was left unaltered by Pomeroy.

84. T.M. COOLEY, *supra* note 46, at 174-75; T. SEDGWICK, *supra* note 83, at 151-52.

ary of both judicial enforcement of, and legislative interference with, individual rights.[85]

Cooley, for example, presented the protection of vested rights as a constitutionalized version of the doctrine of equitable estoppel:

> The chief restriction is that vested rights must not be disturbed; but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, as importing a power of legal control merely, but rather as implying a vested interest which it is equitable the government should recognize, and of which the individual cannot be deprived without injustice.[86]

Marshall had employed a similar sort of reasoning in *Fletcher v. Peck*:

> Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.
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> . . . .
>
> . . . A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.[87]

Prominent, of course, among the principles guiding the equitable application of existing legal rules so as to protect individual rights was that militating against the retroactive application of statutes, although there was disagreement about the kinds of cases in which a party against whom a statute was applied retroactively had been divested of a vested right. Sedgwick came close to arguing that the protection of vested rights required invalidating all retrospective statutes when he rejected certain doctrines formulated by the courts to determine whether a retrospective statute acted upon a vested right:

> In regard to this matter of remedies, it has been in several cases held, that the right of the Legislature to interfere depended on the point whether the end sought to be attained by the Legislature was a good one. So, an act cutting off the defense of usury was held valid, because usury was considered an

85. T.M. COOLEY, *supra* note 46, at chs. V, IX & XI; T. SEDGWICK, *supra* note 83, at ch. V.

86. T.M. COOLEY, *supra* note 46, at 357-58.

87. 10 U.S. (6 Cranch) at 135, 137.

immoral defense. So, the Supreme Court of Massachusetts has said there could be no vested right to do wrong. So, the act confirming invalid marriages was held to be good, because the object aimed at by the Legislature was commendable. But this is a formidable if not a fallacious line of reasoning. It assumes that a power exists in the judiciary to decide on the morality, wisdom, or justice of acts of legislation, and to treat them accordingly.[88]

Nonetheless, Sedgwick admitted:

There is, indeed, a large number of cases in which appeals are made for legislative relief or assistance, in which it would be very injurious to assert the doctrine that the Legislature is incompetent to pass laws having a retroactive effect. . . . In these, and many other cases, it is difficult to avoid giving the acts of the Legislature a retroactive effect; and every such effect must or may influence injuriously some individual case. But the interests of the community are paramount.[89]

Cooley demonstrated greater faith in the Court's equitable judgment: "There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void. The different decisions have been based upon facts making the different rulings applicable."[90] A controversial example of this sort of judgment follows:

Other cases . . . hold that, although [a] deed was originally ineffectual for the purpose of conveying the title, [a] healing statute may accomplish the intent of the parties by giving it effect. At first sight these cases might seem to go beyond the mere confirmation of a contract, and to be at least technically objectionable, as depriving a party of property without due process of law; since they proceeded upon the assumption that the title still remained in the grantor, and that the healing act was required for the purpose of divesting him of it, and passing it over to the grantee. There is some apparent force, therefore, in the objection that such a statute deprives a party of vested rights. But the objection is more specious than sound. If all that is wanting to a valid contract or conveyance is the observance of some legal formality, the party may have a legal right to avoid it; but the right is coupled with no equity, even though the case be such that no remedy could be afforded the other party in the courts. The right which the healing act takes away in such a case is *the right in the party to avoid his contract*— a naked legal right, which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.

. . . .

The operation of these cases, however, must be carefully confined to the parties to the original contract, and to such other persons who occupy the

88. T. SEDGWICK, *supra* note 83, at 660-61.
89. *Id.* at 170.
90. T.M. COOLEY, *supra* note 46, at 370.

> same position with no greater equities. Subsequent *bona fide* purchasers cannot be divested of the property they have acquired, by a retrospective act changing the legal position of the grantor in regard to the thing purchased. . . . The position of the case is altogether changed by this purchase. The legal title is no longer separated from the equities. . . . Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and it is secure against legislative interference.[91]

Despite the disagreement about the exact point at which the exercise of the Court's judgment about the equitable application of legal rules to define vested rights devolved into review of the "wisdom" of the legislation itself, the message conveyed by Cooley and Sedgwick was the same. The reasoning employed by the courts to define vested rights was about the *application* of legal rules and was therefore different in kind from the political choices embodied in the formulation of the substantive legal rules themselves.

Classifying decisions about vested rights under the heading of judgments about the application of legal rules served to analogize the protection of vested rights to an aspect of the judicial function—doing equity *within* the framework of laws enacted by the sovereign—the legitimacy of which had a heritage independent of the institution of judicial review itself. For instance, frequent analogy was made between the maxims guiding equity practice in England and the principles guiding the definition of vested rights, although it was understood that the "republican" innovation was to employ these principles as restrictions upon the subsequent exercise of legislative power and not as "rules of construction only."[92] Where, for example, Cooley and Sedgwick disagreed on some of the cases in which a retrospective statute divested a vested right, they could agree that it was "a sound rule of construction to give a statute a prospective operation only, unless its terms show a legislative intent that it should have retrospective effect."[93]

The belief in the "legal" nature of the mode of reasoning represented by the application of legal rules to protect individual rights informed the way in which both Sedgwick and Cooley saw judicial protection of individual rights as reconciled with legislative power. Sedgwick defined legislative power as the "lawmaking power" and judicial authority to void statutes divesting vested

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91. *Id.* at 377-79 (citations omitted).
92. T. SEDGWICK, *supra* note 83, at 164.
93. T.M. COOLEY, *supra* note 46, at 370; *id.* at 173.

rights as a consequence of its power to require that the legislature "act through law."[94] While acknowledging that the exercise of this power entailed difficult decisions about the "true nature of laws," Sedgwick understood those decisions to be different in kind from the considerations of "substance" that would result if judges "abrogate[d] an authority so vague and so dangerous as the power to define and declare the doctrines of natural law and abstract right."[95] Similarly, Cooley defined legislative power as "legislative sovereignty," and judicial authority to void statutes divesting vested rights as a consequence of its power to limit the legislature to the performance of "legislative functions."[96] While this formulation also raised difficult questions about the nature of the legislative function, Cooley listed as his first fundamental rule: "The legislative department is not made a special agency for the exercise of specifically defined legislative power, but is entrusted with the general authority to make laws at discretion."[97] In either view, the

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94. T. SEDGWICK, *supra* note 83, at 154.

95. *Id.* at 155-56, 159.

> It is very plausible to say that the legislature ought not to be permitted to do anything flagrantly unjust, as, to take the property of A and give it to B; to make a man judge in his own case, or commit any other enormity. But in every case there are disputed questions of fact as well as of principle; and the real point is whether the Legislature shall decide on the nature of the public exigency and the rights of its subjects, or whether the judiciary shall assume that power. It is conceded that the power of the Legislature must be confined to "making laws." But the very words of our State Constitutions which declare them the law-making power exclude the judiciary from any share in it; and such share they will undoubtedly have if they are at liberty to refuse to execute a statute, on the ground that it conflicts with their notions of morality or justice. . . .[W]ho will undertake to decide what are the principles of eternal justice? And who can pretend to fix any limits to the judicial power, if they have the right to annul the operations of the Legislature on the ground that they are repugnant to natural right?
>
> . . . [T]he Legislature is to confine itself to its function of "making laws." . . . The imperfection of language does not permit us to define with absolute precision the meaning of the term "law," but each case must depend upon its peculiar features.
>
> . . .[I]t is the right and duty of the judiciary to repress and confine the legislative body within the true limits of the law-making power, but that they have no right whatever to set aside, to arrest, or nullify a law passed in relation to a subject within the scope of legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice, or sound morality.

Id.

96. T.M. COOLEY, *supra* note 46, at 85-90.

97. *Id.* at 87.

concept of vested rights legitimated judicial review of individual rights by confining it to the manner in which legislative power was exercised, and excluding review of the substantive exercise of the "general authority to make laws at discretion."[98]

The distinction thus drawn between legal reasoning about the application of the standing law to protect individual rights, and political judgment about the substance of legal rules helps explain the framework in which the debate brought to fruition in *Ogden* developed. The claims made by Marshall and Johnson in *Fletcher v. Peck*, that the protection of vested rights was consistent with the legislature's possessing the "most absolute power," the "right of jurisdiction," or "sovereignty,"[99] all make sense when viewed against the backdrop of the concepts of vested rights and legislative sovereignty. Where the former was understood to encompass a bounded form of legal reasoning about the application of legal rules, the latter was understood as discretionary power over the substance of legal rules themselves.

The test of the concept of vested rights arose in the bankruptcy cases. In *Sturges v. Crowninshield* the Court, in an opinion by Marshall, voided a New York bankruptcy statute under which a debtor had been discharged from paying a debt incurred prior to the enactment of the statute.[100] The decision, therefore, could have rested entirely on the theory that the legislation had divested a right vested under the standing law by purporting to absolve the debtor from a pre-existing debt. Although adopting this line of reasoning for the bulk of his published brief, the creditor's attorney also argued that the invalidity of the statute did not depend on its retrospective application:

> Legislatures act within the limits of their powers, only when they establish laws to enable parties to enforce contracts; laws to afford redress to the injured against negligence and fraud in not performing engagements; and Courts act within their proper sphere, when they confine themselves to the exposition of those contracts, and giving efficacy to the laws.[101]

The suggestion that *all* bankruptcy statutes were unconstitutional, as opposed to only those applied to discharge pre-existing debts, implied that the Court could legitimately protect substantive

98. *Id.*
99. 10 U.S. (6 Cranch) at 134-35.
100. 17 U.S. (4 Wheat.) 122 (1819).
101. *Id.* at 131-32.

rights by reviewing directly the content of the contract rules enacted by the legislature.

In the *Sturges* opinion, Marshall avoided addressing the question of whether the Court was voiding all bankruptcy laws or only those which discharged pre-existing debts. Yet at one point in the opinion he advanced an argument that appeared to accept the idea that it was the substance of the bankruptcy act and not its retrospective application that was offensive. Noting that the distinction between "the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at bar, and exists in the nature of things," Marshall suggested that legislative power to enact contract rules extended only to the provision of remedies.[102] Although admitting that remedies could "certainly be modified as the wisdom of the nation shall direct," Marshall implied that the legislature's remedial discretion could not be exercised to impair rights whose content could be determined by the Court independently of the established contract regime.[103]

In *M'Millan v. M'Neil*, the case immediately following *Sturges* in the reports, Marshall clarified his position by stating that the result in *Sturges* had not depended upon the fact that the statute in that case applied to pre-existing debts.[104] This portion of the opinion, however, was understood to be dicta about an as yet unsettled question. Since the bankruptcy law invalidated in *M'Millan* had been applied to discharge a debtor from paying a debt incurred in another state, it was recognized that the Court had not faced squarely the issue of the constitutionality of prospective bankruptcy laws where there was no doubt about the governing law. In his *Commentaries*, James Kent noted that the statute invalidated in *M'Millan* might have been unconstitutional in its application to debts incurred outside the territorial limits of the state and not because its application to debts incurred after its passage impaired the obligation of contracts.[105] It was therefore left to *Ogden v. Saunders*[106] for the Court to decide if it would conceive itself as the guarantor of vested or substantive rights by deciding on the legitimacy of its reviewing the content of the state's con-

102. *Id.* at 200.
103. *Id.*
104. 17 U.S. (4 Wheat.) 209, 212-13 (1819).
105. J. KENT, COMMENTARIES ON AMERICAN LAW 395 (1826).
106. 25 U.S. (12 Wheat.) 213 (1827).

tract rules when their application to subsequent contracts vitiated any claim that they divested rights derived from the standing law.

In seriatim opinions, a four judge majority in *Ogden* held that the contract clause prohibited only those bankruptcy laws which purported to apply to antecedent debts.[107] Marshall published a dissent joined by Justices Story and Duvall, his only published dissent in his thirty-five year tenure on the bench.[108] The decision answered, for the antebellum legal elite, the question of whether there were any substantive rights against the state under the federal Constitution. It thereby brought to the surface an underlying conception of the Court's legitimate function in enforcing individual rights and made clear the limitations on the Court's role understood to follow from that conception.

Although Marshall's dissent is well known for his description of the origin of the right to contract in the state of nature, he made it clear that he understood the obligations protected by the contract clause to be legal and not moral:

> All admit, that the constitution refers to, and preserves, the legal, and not the moral obligation of a contract. Obligations purely moral, are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on States by the constitution, are intended for those objects which would, if not restrained, be the subject of State legislation. What, then, was the original legal obligation of the contract now under the consideration of the Court?[109]

All, then, depended upon the law defining the "original legal obligation of the contract" at the time it was created.[110] On this question, Marshall balked at arguing that it was the natural and not the positive law which defined contractual obligations. Acknowledging the constitutionality of prospectively applied usury laws and the states' statutes of frauds, Marshall admitted the existence of legislative power to prevent certain obligations from arising in the first instance.[111] The question, as noted by Justice Trimble, was why, if the legislature had *that* power, could it not declare in a prospective bankruptcy act that contracts would be given a "conditional or qualified obligation which would cease on the happening

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107. *Id.* at 256-57.
108. *Id.* at 332-56 (Marshall, C.J., dissenting).
109. *Id.* at 337-38.
110. *Id.*
111. *Id.* at 348.

of a future event?"[112]

Marshall responded with two related arguments for why the bankruptcy act could not be understood to have defined a conditional obligation which was not impaired by the subsequent application of the discharge. The first was perhaps his better known argument that such an obligation was inconsistent with the "pre-existing obligation to do that which one has promised on consideration to do," which he derived from the natural right to contract.[113] The second was that the contract clause prohibited the state legislatures from creating a conditional obligation of the kind set forth in the act:

> That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim, will not be denied.
>
> A law may determine the obligation of a contract on the happening of a contingency, because it is the law. If it be not the law, it cannot have this effect.
>
> In our system, the legislature of a State is the supreme power, in all cases where its action is not restrained by the constitution of the United States. Where it is so restrained, the legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question to say, that, because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the legislature of New York; for the question returns upon us, is this act a law? Is it consistent with, or repugnant to, the constitution of the United States? This question is to be solved only by the constitution itself.[114]

Using either argument, Marshall did not succeed in convincing the majority that his approach provided an intelligible legal standard for distinguishing the bankruptcy act from other prospective regulations of the power to create a legally binding contract. Moreover, at the penultimate point in his opinion, Marshall did his best to distinguish the bankruptcy act without judging the relative merits of various prospective contract rules. Instead, he attempted to show that the key factor was the time at which the act could be said to operate upon the contract. If it had no effect on the original legal obligation of the contract, then the statutory discharge subsequently applied could be conceived to divest an existing legal right:

> The time to which the word "impairing" applies, is not the time of the passage of the act, but of its action on the contract. That is the time present in

112. *Id.* at 323.
113. *Id.* at 344 (Marshall, C.J., dissenting).
114. *Id.* at 347-48.

> contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. . . . When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation.[115]

But Marshall's argument here avoided rather than answered Trimble's question. If usury laws and the statute of frauds acted on contracts at the moment of their passage, such that their subsequent application impaired no legal obligation, why did the bankruptcy act not have the same effect?

Whatever Marshall had in mind by arguing that the bankruptcy act, unlike other prospective contract rules, had "no effect whatever on the contract . . . at its passage,"[116] it seems clear that his approach failed to persuade where it suggested substantive limitations on the power to regulate subsequent contracts. Justice Trimble's opinion provides an illuminating contrast, since he too argued that the "natural" obligation may sometimes be legally enforceable: "[I]f there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for, and put in the place of, natural obligation, would be co-extensive with it."[117] Trimble did not take issue with Marshall's assertion as to the existence of a natural obligation; instead he denied its direct enforceability where the legislature had *previously* defined an applicable legal rule. To the extent not delimited by laws in place at the time the contract was made, Trimble would also understand the obligation of the contract to correspond to the parties' natural rights. The conflict was thus not about the meaningfulness of thinking about the obligation of a contract as derived from the natural law, but about the justiciability of the parties' natural rights where the political sovereign had previously defined a legal obligation different from that which would have been recognized in the absence of applicable legislation.

Commentators attempting to reconstruct the ideas influential in the cases through *Ogden* have sought to discover underlying judicial beliefs by researching the frequency of express endorsements of the practice of appealing to constitutional principles independent of the constitutional text. Despite the agreement between Marshall and Johnson on the result in *Fletcher* and on its ration-

115. *Id.* at 337.
116. *Id.*
117. *Id.* at 320.

ale under the concept of vested rights, their opinions are better known for their partially conflicting statements on the source of the Court's authority to enforce what were acknowledged as vested rights. Marshall vacillated on whether the holding followed simply from "the nature of society and of government" (thus applying even if Georgia were "a single sovereign power") or as a consequence of the national judicial review imposed by the contract clause.[118] Johnson eschewed any reliance on the contract clause and rested his decision on "a general principle, on the reason and nature of things: a principle which will impose laws even on the deity."[119]

To view these statements as endorsements of alternative sources of constitutional values, indicative of conflicting jurisprudential assumptions, is to elevate the form over the substance of the opinions. As is evident in *Fletcher* and *Ogden*, the background principle of vested rights can be found to underlie equally the limits to antebellum judicial interpretation of the contract clause and the limits to judicial authority to invalidate statutes on the basis of "general principles" of constitutional law.[120]

In contrast to the express endorsements of appealing to non-textual sources in *Fletcher*, traditionally cited as evidence of natural law thinking, Ely draws attention to what he views as the "interpretivist" approach manifested in *Ogden* by *all* the judges.[121] Nonetheless, this analysis appears also to seize on only one aspect of the opinions. The majority justices in *Ogden* argued that in reading the contract clause to apply only to antecedent debts, they were construing it consistently with the concept of vested rights, a principle whose legitimacy did not require express constitutional authorization.[122] As in *Fletcher*, both textual and non-textual sources were cited in what appears to have been understood as a debate about judicial enforcement of vested or substantive rights. It was Johnson who cast the deciding vote in *Ogden*, harkening back to his support for the protection of vested rights as a princi-

118. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135-36 (1810).

119. *Id.* at 143.

120. What could be justified as a consequence of the federal contract clause or only on general constitutional principles became dispositive only when the Court, after *Ogden*, undertook to distinguish between its jurisdiction to protect individual rights in diversity and federal question cases. *See infra* text accompanying notes 172-73.

121. J.H. ELY, *supra* note 34, at 209 n.41.

122. Ogden v. Saunders,.25 U.S. (12 Wheat.) 213, 347-48 (1827); *see also id.* at 295-96.

ple understood not to depend upon any express constitutional authorization. Justice Thompson expressed a similar view while joining in the Court's rejection of substantive rights:

> No State Court would, I presume, sanction and enforce an *ex post facto* law; if no such prohibition was contained in the constitution of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles, upon which every just system of laws is founded. It is an elementary principle adopted and sanctioned by the Courts of justice in this country. . . .[123]

The inquiry into the frequency of express appeals to textual or non-textual sources of individual rights therefore does not explain the ideas influential in the development of contract clause jurisprudence through *Ogden*. Other commentators have focused their research on the actual holdings of the Court under the contract clause as a second reflection of judicial assumptions. Tribe and Isaacs, for example, have used the justices' positions in *Ogden* as an indicator of whether they perceived the obligation of contracts to be defined by the positive or natural law. Both argue that the decision to invalidate only those bankruptcy laws applied to pre-existing debts reflects the majority's "basic" postulate that "a contract incorporates in its terms the positive law of the time and place where it is made."[124] On this view, it is the Court's denial of a natural right to contract that distinguishes its approach in *Ogden* from that of the dissenters, whose view is taken to represent the assumption evident in the earlier cases.

The attempt to so characterize the beliefs of the judges falters most obviously in the case of Justice Johnson. His opinion includes a disquisition on the origin of the right to contract in the state of nature as explicit and eloquent as that which appears in the Marshall opinion.[125] In addition, Justice Washington acknowledged that the universal law "creates the obligation of a contract made upon a desert spot, where no municipal law exists": even where the municipal law existed, the universal law could be understood to create "part" of the obligation of contracts.[126] This position was similar to Justice Trimble's belief that the natural law controlled

123. *Id.* at 303-04.

124. L. TRIBE, *supra* note 33, at 467-68.

125. *Compare* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 282-92 (1827) *with id.* at 345-57.

126. *Id.* at 258-59.

interpretation of the obligation of contracts where the legislature had not exercised its power to regulate subsequent contracts through control over the content of prospective legal rules. Moreover, the argument that contracts incorporate the law of the time and place where they were made was mustered in the majority opinions to support, by analogy to conflicts of law rules, legislative power over the content of contract rules, not to deny the natural right to contract.[127]

Thus, the understanding of the right to contract as derived from the natural law was not perceived as inconsistent with the belief that the Court could invalidate only those statutes which divested a right vested under the standing law. The majority justices, for instance, expressed the belief that in defining contract rights vested under the standing law, their task was to enforce the "intentions of the parties" insofar as they were not inconsistent with the legislature's discretionary power over the substance of contract rules.[128] In addition, the majority justices expressed serious doubt as to whether all legislative rules pertaining to contracts could be said to have been incorporated into agreements made during their "tenure." Distinguishing between contract rights and remedies, they noted without expressly deciding that the parties might not be legitimately "deemed" to have contracted with reference to the states' remedial regime.[129] Thus, while acknowledging legislative power over the creation of prospective contract rules, the majority also understood the judicial role in defining vested contract rights as informed by the natural right of the parties to "impose [a law] upon themselves."[130]

Even Tribe recognizes that in view of the additional doctrinal tests used by the Court to determine when a right had vested, the concession to positivism represented by *Ogden* can be understood as only partial. Discussing the distinction between contract rights (held to vest) and contract remedies (held not to vest), Tribe concludes that continuing natural law thinking can be discerned in the Court's decision to protect not all legal rights defined by the standing law, but rather only those upon which it felt individuals were

127. *Id.* at 259, 298-300. The references were to the conflicts principle holding that contracts were governed by *jure loci contractus.*

128. *Id.* at 256-57.

129. *Id.* at 300-02; *see also id.* at 284-85.

130. *Id.* at 298.

entitled to rely.[131] Corwin made a similar judgment about the natural law basis of such doctrines as "there is no vested right to do wrong," although he portrayed these doctrines as evidence of the continuity of antebellum natural law assumptions.[132]

The characterization of the contract clause holdings as reflective of either a positivist or natural law jurisprudence therefore appears as inconclusive as the research which focuses upon the relative frequency of express endorsements of textual or non-textual modes of constitutional interpretation. Although the decision not to extend constitutional protection to substantive rights was perceived to confine judicial review to rights derived from existing legal rules, it is also true that the actual decisions about *which* rights defined by the standing law "vested" reflected judicial choice about the interests which "it is equitable the government should recognize, and of which the individual cannot be deprived without injustice."[133] The interpretation of the rights created by the standing law reflected *both* the tradition which held that legal rules governed the distribution of legal rights *and* the tradition which held that the interpretation of legal rights depended upon their relation to natural justice and equity.[134]

The attempts to trace the decision for vested rights to either a formal or instrumental style of legal reasoning encounter a similar difficulty. Nelson, for example, appears to suggest that there is evidence for the shift from formalism to instrumentalism in the contract clause cases themselves.[135] Focusing on the cases until *Ogden*,

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131. L. TRIBE, *supra* note 34, at 467-69.

132. *Basic Doctrine, supra* note 32, at 260-61.

133. T.M. COOLEY, *supra* note 46, at 357-58.

134. As Cooley acknowledged, these judgments went beyond the "narrow" or "technical" question of who had a "power of legal control merely" under the standing law. *Id.* The more general problem with this sort of analysis of the beliefs underlying the distinction between rights and remedies and the other boundary doctrines formulated for determining when a right defined by the standing law has vested is that it assumes that a "truly" positivist approach would have protected equally *all* entitlements defined by the existing legal order. That approach would have disabled the legislature from exercising any rulemaking power whatsoever, since an existing legal order defines a *complete* set of entitlements, some of which are unavoidably changed by any legislative intervention. Such a result was obviously not contemplated by the antebellum legal elite, whether it viewed the protection of vested rights as a consequence of the natural or positive law. This point is explored further *infra* at text accompanying notes 188-89.

135. *Constitutional Jurisprudence, supra* note 47, at 955. In contrast, Horwitz rejects the idea that the constitutional cases illustrate the transition from a formal to an instrumental style of reasoning which he finds in the common law cases. He contrasts the instru-

he argues that Marshall's attempt in *Fletcher* and *Dartmouth College* to delineate an "analytically rigorous category of rights subject to legal protection" was evidence of the formal protection of individual rights against the "incursion of political power."[136] He then asserts that the failure of Marshall's "traditional appeal to natural rights" in *Ogden* reflected the breakdown of formalism in "[t]he era of majoritarian democracy ushered in by Andrew Jackson's presidency."[137]

The problem with this analysis is that it fails to distinguish between Marshall's use of the formal style in *Ogden* to argue for the protection of substantive rights and his earlier use of that style to protect rights vested under existing legal rules. Marshall's opinion in *Ogden* was neither traditional nor precedented in view of the analysis of the parties' vested rights employed by the Court in *Fletcher* and *Dartmouth College*. Nelson's explanation therefore fails to account for why the Court viewed Marshall's attempt to protect substantive rights as an illegitimate departure from the accepted mode of reasoning about constitutionally protected individual rights. In addition, the consistency with which the Court and the treatise writers relied upon the concept of vested rights to legitimate the judicial role suggests that the boundary between law and politics depended not on whether an issue was amenable to solution by formal or instrumental reasoning, but rather upon whether it raised a question about the existence of a vested right, appropriate to "legal" reasoning about the individual rights de-

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mental antebellum private law opinions with what he refers to as the "persistent formalism of public law." M. HORWITZ, *supra* note 47, at 255-56. It is therefore not clear how, or whether, he would attribute the development of federal protection of individual rights against the state to the conflicting styles. At one point, he appears to link the persistent formal style of the public law cases to the judges' retaining judicial control over potentially redistributory statutory law, while employing instrumental reasoning in the private law cases whose redistributive impact they controlled (to the benefit of mercantile and entrepreneurial groups). *Id.* at 256. Although Horwitz accomplishes the goal he set for himself—to correct the distortion in legal views of the nineteenth century which resulted from "excessive equation of constitutional law with law" (*id.* at xii)—his discussion of the relation between results and reasoning styles here comes perilously close to undermining his conception that the "legal consciousness in any particular period is not simply the sum of those contemporary social forces that impinge upon law." *Id.* at xiii. If the reasoning styles were employed as more or less convenient forms for protecting certain social interests, then it is not clear how these styles reflected an autonomy of the law to the "extent that ideas are autonomous." *Id.*

136. *Constitutional Jurisprudence, supra* note 47, at 936.

137. *Id.* at 955.

rived through the application of the standing law.

Sedgwick, in fact, discussed explicitly what might be characterized as an instrumental conflict at the root of defining vested rights:

> Let us . . . sum up the result of our researches, and state as accurately as we can what direct interference with private rights and interests of property can and cannot be accomplished by laws.
>
> The difficulty of this subject fully equals its importance: on the one hand, any interference with rights acquired under existing laws is a positive evil and injury; while on the other, to deny to the Legislature power to make such changes as the social or political condition requires, would reduce us to a state of Chinese stagnation and immobility, and would be absurdly inconsistent with the condition of our country and the character of our people. These inherent difficulties have led to frequent contradiction; and there is perhaps no subject of equal importance on which there are greater incongruities than on the point, what rights are vested so as to be beyond the reach of legislative action, and what are within its proper and regular control.[138]

In contrast, Cooley avoided any explicit discussion of conflict by erecting the decisions into an edifice of formal categorical rules:

> *[A] mere expectation of property in the future is not a vested right.*
>
> *[T]he right to a particular remedy is not a vested right.*
>
> *[A] right to be governed by existing rules of evidence is not a vested right.*
>
> *[A] party has no vested right in a defence based upon an informality not affecting his substantial interest.*
>
> *A statutory privilege is not a vested right.*[139]

Both Cooley and Sedgwick, however, agreed on the centrality of the concept of vested rights to the proper judicial role in the protection of individual rights against the state.[140]

In context, therefore, the references in *Ogden* to the obligation of contracts incorporating the positive law of their time and place do not reflect a denial of the meaningfulness of natural law, but rather a reaffirmation of the idea, central to *Fletcher v. Peck*,[141] of the justiciability of rights vested under the standing law. Insofar as vested contract rights appeared to reflect both the natural right to contract and the rights derived from the operation of legal rules enacted by the political sovereign, their support drew upon argu-

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138. T. SEDGWICK, *supra* note 83, at 649-50.
139. T.M. COOLEY, *supra* note 46, at ch. XI.
140. *Id.* at chs. V, IX & XI; T. SEDGWICK, *supra* note 83, at ch. V.
141. 10 U.S. (6 Cranch) 87 (1810).

ments derived from both jurisprudential "schools." Justice Johnson saw both approaches incorporated in the concept of vested rights:

> Right and obligation are considered by all ethical writers as correlative terms: Whatever I by my contract give another a right to require of me, I by that act lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three,—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law.[142]

The question was not which justices believed in a natural law foundation for the law of contracts; it was the extent to which that accepted foundation was thought to legitimate judicial review of legislative contract rules—a question which the majority answered by rejecting what it perceived as substantive review of the states' prospective legal rules.

The acceptance of the notion that the natural law was realized through the positive law by judicial enforcement of rights vested under standing legal rules further illustrates the difficulty in portraying *Ogden* as the positivist counterpoint to the natural law assumptions of the earlier cases. Justice Chase's opinion in *Calder v. Bull*, which, for Corwin, most clearly reflected these early assumptions, in fact incorporates beliefs virtually identical to those informing the majority's approach in *Ogden*.[143] In the list of acts Chase cited as violative of the "first great principles of the social compact," he included the following:

> A law that punished a citizen for an innocent action, or, in other words, for an act, which when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. . . . [T]he Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of

142. Ogden v. Saunders, 25 U.S. (12 Wheat.) at 281-82. This statement was adopted by Story. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1372, at 243-44 (1833).

143. 3 U.S. (3 Dall.) 386, 388 (1798).

private property.[144]

The reference to the legitimacy of protecting, through judicial review, *antecedent* private contracts and the reference to legislative power to create rules for future cases is consistent with what the Court in *Ogden* understood to be the judicial role prescribed by the concept of vested rights. In addition, when Chase discussed "the right of private property" protected by the "very nature of our free Republican governments," he understood it to be enforceable by judicial review through the protection of rights vested under the standing law:

> It seems to me, that the right of property, in its origin, could only arise from compact express, or implied, and I think it the better opinion, that the right, as well as the mode, or manner, of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; it is regulated by civil institution, and is always subject to the rules prescribed by positive law. When I say that a right is vested in a citizen, I mean, that he has the power to do certain actions; or to possess certain things, according to the law of the land.[145]

For Chase, therefore, as for the majority in *Ogden*, the understanding of a natural right to contract and to own private property was not perceived as inconsistent with the idea that these rights became justiciable only when recognized in legal rules acknowledged by the sovereign. The basic postulate of *Ogden* was not dissimilar to that underlying the earlier cases: natural individual rights to contract and to own private property could be legitimately enforced by judges exercising the power of judicial review through the interpretation of positive law, when realization of these rights as vested under standing legal rules did not infringe upon legislative power over the substance of legal rules.

The decision to protect only vested rights against the state hence resists accurate characterization in terms of the categories of natural law, positivism, formalism, or instrumentalism—oppositions which may nonetheless seem inevitable to twentieth century legal thinkers. What appears distinctive about antebellum judicial review of individual rights is the shared sense of the justiciability of vested rights which made it possible to view judicial protection of individual rights as legitimate, whether linked to the

144. *Id.*
145. *Id.* at 394.

natural or positive law or reasoned about in a formal or instrumental manner. The vested right played the central role in a conceptual structure whose integrity was not viewed as threatened by the contradiction between the alternative theories of law or styles of legal reasoning. The vested right was *both* "positive" (in the sense of reflecting a right derived from a legal rule acknowledged by the sovereign) and "natural" (in the sense that its vested character depended in *some* cases upon the "equities" of the party claiming the right). Moreover, there might or might not be a text protecting the vested right (and one might or might not be required), depending upon the source of the Court's jurisdiction in the case.[146] Finally, the conflict between vested rights and legislative power might be reasoned about through the instrumental arguments that could be marshalled on behalf of stability and change and through the categorical distinctions between vested rights on the one hand, and "mere expectations," "statutory privileges," and rights based on "mere formalities" on the other.

The histories which attempt to link the evolution of antebellum judicial review of individual rights to natural law or positivist assumptions or formal or instrumental styles of legal reasoning thus miss the way in which the concept of vested rights functioned in legal thought to mediate the contradictions of political and moral theory that would have been confronted had the legal elite felt compelled to choose one of the alternative approaches to the exclusion of the other. The point is that the concepts of legislative sovereignty and vested rights were experienced as *legal* concepts and hence different from their counterparts in political theory. Thus reconstituted, they made it possible for the legal elite to deny the existence of an irreconcilable conflict between judicial review of individual rights and a democratically legitimated legislature. One anonymous commentator summed up the mediating function of the concept of vested rights by using it to prove illusory the seeming contradiction between democratic legitimacy and an independent judiciary entitled to invalidate statutes on behalf of individual rights:

> A law is, from its very nature, an inflexible and universal rule, that governs the conduct, and defines the rights and duties, of all persons subject to the law-making power, during the whole period of its existence. It is not an un-

146. *See infra* text accompanying notes 150-51.

changeable rule for the future, because the same power which enacted may abrogate it, and put another in its place. But it is unchangeable in its application to all cases which have grown up during its continuance. Adopt, then, the most comprehensive and unlimited theory respecting the sovereignty of the people; say that they may frame what enactments they like, on all manner of subjects, or may even annul all existing statutes, and live without law for all time to come. Still their power relates only to the present and the future. The past is fixed and irrevocable. The sovereign may enact or abrogate what rules it pleases to govern coming events and the future conduct of men; but it cannot annul the rights, the contracts, and the expectations which have grown up under the laws that did exist. In respect to these, the government covenanted with every individual, and every individual with the government, that the statute should be respected and obeyed, *on condition* that it should be fixed and universal in its obligation. The price has been paid, and the fulfillment of the contract is demanded. Men have made bargains, and contracted obligations, and regulated their conduct, in strict conformity with the law. And they now require, that those bargains should be fulfilled, those obligations respected, and their conduct declared to be innocent, and not liable to punishment. . . .

We now see the reason why the legal tribunals rightly claim to be considered as the fountains of equity, justice, and natural law, however arbitrary, impolitic, and even unjust, may be the usages and the special enactments which they are required to interpret and enforce. They are not responsible for the intrinsic merits or defects of these customs and laws; that is the business of the legislature. They only unfold and apply the great principle of natural right, or law abstractly considered; which is, that the actions of men must be judged, and their consequences determined, by a fixed law, promulgated at the time when those acts were committed, imperative and permanent in its obligation in reference to them, and definite and unchangeable in its application. To ascertain what this law is, and to apply it to the case in hand, is the high function of the courts. Public opinion cannot aid them in this task, for it is not within the province even of Omnipotence to recall the past, or to alter one jot of the eternal law of justice. The clamors of the multitude must be unheeded, for the judges are listening to a voice as awful as that which proclaimed the law in thunder from the top of Mount Sinai. It is of law thus abstractly considered, that the sublime language of Hooker hardly seems to contain an exaggeration, when he says, that "its seat is the bosom of God, and its voice is the harmony of the world."[147]

B. *The Decision to Limit Federal Judicial Authority to Protect Vested Rights*

Although the decision for vested rights determined the man-

147. *The Role of the Judiciary*, in THE GOLDEN AGE OF AMERICAN LAW 147 (C. Haar ed. 1965), excerpted from *The Independence of the Judiciary*, THE NORTH AMERICAN REVIEW 403 (1843).

ner in which the Court reconciled judicial protection for individual rights and legislative power, it left open the question of the extent to which the protection of vested rights was legitimately a matter for the federal or state judiciary. This section examines the independent impact of jurisdictional limitations on the doctrines created under the contract clause, which also became explicit only after Marshall's defeat in *Ogden*. The realization that the significance of his defeat was in the Court's decision not to read the contract clause to protect substantive rights against the state suggests an alternative reading of the ideas influential in the cases after *Ogden*, the importance of which has previously been understood as part of a positivist jurisprudential trend.

One aspect of the potential federalism problem in the enforcement of individual rights by the federal judiciary had been resolved by the decision in *Ogden* to protect only vested rights against the state. Because *Ogden* resolved generally the problem of the judicial and legislative role in the definition of individual rights at the federal judicial level, it also incorporated a decision on how to resolve *federal* judicial power and *state* legislative power over individual rights. Marshall had attempted to take the initiative on this aspect of *Ogden* by arguing that the protection of vested rights by the Court would be more intrusive of state sovereignty than would be the Court's protection of substantive rights. Seizing on the majority's failure to endorse expressly state legislative power to alter contract remedies retrospectively, Marshall argued that the effect of the holding would be a "mischievous abridgement of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal or modify such laws with respect to existing contracts."[148] Only Johnson answered him directly:

> I must not be understood here, as reasoning upon the assumption that the remedy is grafted into the contract. I hold the doctrine untenable, and infinitely more restrictive on State power than the doctrine contended for by the opposite party. Since, if the remedy enters into the contract, then the States lose all power to alter their laws for the administration of justice. . . . The law of the contract remains the same every where, and it will be the same in every tribunal; but the remedy necessarily varies, and with it the effect of the constitutional pledge, which can only have relation to the laws of distributive justice known to the policy of each State severally.[149]

148. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 343 (1827).
149. *Id.* at 284-85.

The other majority justices, who deferred decision on the right/remedy question, answered Marshall's charge more generally, by arguing that federal judicial enforcement of substantive rights entailed the usurpation of state sovereignty in precisely the same way as it infringed upon legislative sovereignty. Washington noted that if the Court were to enforce the "common law of nations" which "declares that men shall perform that to which they have agreed," without subordinating it to the "municipal laws of the land where the contract was made, or is to be executed":

> [I]t is very apparent, that the sphere of State legislation upon subjects connected with the contracts of individuals, would be abridged beyond what it can for a moment be believed the sovereign States of this Union would have consented to; for it will be found, upon examination, that there are few laws which concern the general police of a state, or the government of its citizens, in their intercourse with each other, or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form.[150]

Thus, judicial review of vested rights was viewed as confining *federal* judicial power over individual rights against *state* legislative power to the same extent that it was viewed as confining judicial power to protect individual rights against legislative power. Federal judicial review of vested rights thus acknowledged both state and legislative "sovereignty" over the substance of legal rules.

The decision to protect only vested rights against the state, however, was independent of the jurisdictional problem about the division of authority to define individual rights between the state and federal courts. Since the sort of reasoning associated with judicial review of vested rights was equally capable of application by either the state or federal judiciary, the decision for vested rights did not encompass an answer to the separate issue of which courts should have final authority to define them. Of course, by the time *Ogden v. Saunders*[151] was decided, it was clear that there was considerable federal judicial authority to review claims based on the violation of vested rights. Yet the limitations (if any) on the authority of the federal courts to protect vested rights, and their implications for the division of federal and state judicial power over individual rights against the state remained unsettled.

Ambiguity evident in the early cases between enforcing vested

150. *Id.* at 258-59.
151. 25 U.S. (12 Wheat.) 213 (1827).

rights as a matter of the general principles of constitutional law or of express federal constitutional protection for the obligation of contracts reflected the Court's concern with distinguishing between its power to protect individual rights in cases arising under the diversity or federal question jurisdiction. The early cases that were justified without reliance on the contract clause turn out to be those appealed within the diversity jurisdiction, in which the Court manifested a willingness to conceive itself the final authority over all claims concerning the violation of vested rights. In contrast, the cases justified by reliance upon the express protection for the obligation of contracts were those appealed under the federal question jurisdiction, where section 25 of the Judiciary Act required a claimed violation of a *federal* constitutional provision as a predicate to the exercise of the Court's power.[152] For example, a unanimous Court in *Terret v. Taylor*,[153] a diversity case, invalidated acts of the Virginia legislature denying title in the Episcopal Church to certain lands on a principle similar to that applied in *Dartmouth College* without any reliance on the contract clause. Justice Story wrote:

> But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.[154]

In contrast, in *Dartmouth College* itself, a federal question case appealed under section 25 of the Judiciary Act, express reliance was placed on the contract clause.[155]

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152. The Judiciary Act authorized Supreme Court review of lower federal court decisions in civil cases where the amount in controversy exceeded two thousand dollars. There was no requirement of a federal question. Section 25(c) provided for review of state court decisions without regard for the amount in controversy, but only "where is drawn in question the construction of any clause of the constitution, . . . and the decision is against the title, right, privilege or exemption specially set up or claimed. . . ." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 35-36 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

153. 13 U.S. (9 Cranch) 43 (1815).

154. *Id.* at 52.

155. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 519 (1819).

Nonetheless, the question about the extent to which the Court had final authority to define vested rights remained open until *Ogden v. Saunders*.[156] Nothing in the Court's interpretation of the contract clause up to, and including *Ogden*, indicated that it was conceived as narrower than the concept of vested rights applied in diversity cases as a general principle of constitutional law. When *Ogden* was decided, therefore, Marshall could note that it still was not clear whether the Court would read the contract clause to protect all vested rights or only those "relating to contracts," and if the latter, how the Court would delimit the universe of rights "vested by contract."[157]

In two cases following *Ogden*, the Court directly addressed the division of state and federal jurisdiction to protect vested rights by formally distinguishing between the scope of its jurisdiction to review state statutes in cases appealed from the state supreme courts and those appealed from the federal circuit courts. Since there was no general federal question jurisdiction in the lower federal courts, the distinction between cases appealed from the federal circuit courts and the state supreme courts corresponded to the distinction between cases appealed under the federal question jurisdiction and those appealed within the diversity jurisdiction.[158] The first was *Satterlee v. Matthewson*, a case appealed under section 25 from the Supreme Court of Pennsylvania.[159] In that case, a statute redefining the legal effect of certain land conveyances was applied retrospectively to alter the plaintiff's title. The plaintiff claimed that the statute violated the contract clause and divested a vested right. Separating the question of whether the statute divested a vested right from the question of whether it impaired a right vested by contract, the Court (per Justice Washington) held that the contract clause question was all that it could review when, as in *Satterlee*, it was reviewing the decision of a state supreme court under the Judiciary Act.[160] Washington noted further that the general vested rights claim could be considered in a state court or in

156. 25 U.S. (12 Wheat.) 213 (1827).

157. *Id.* at 355-56.

158. There was no statute providing for general federal question jurisdiction in the lower federal courts until 1875, except for a brief period at the end of the Adams and the beginning of the Jefferson administrations. *See* HART & WECHSLER, *supra* note 152, at 844-50.

159. 27 U.S. (2 Pet.) 380 (1829).

160. *Id.* at 409-10.

the Supreme Court if it were reviewing the decision of a federal circuit court in a diversity case.[161]

To distinguish between claims based solely on the doctrine of vested rights and those based on the contract clause, the Court differentiated between "rights vested by contract" and all vested property rights.[162] In doing so, however, it did not disavow its earlier statements concerning the general invalidity of all statutes divesting vested rights. Endorsing "non-textual" rationales of the earlier cases insofar as they could be understood to reflect the concept of vested rights, the Court nonetheless held that it could entertain claims based on a statute's divesting vested "property" rights only in cases arising under the diversity jurisdiction, when it was perceived to have a general jurisdiction equivalent to the state courts:

> In the case of *Fletcher v. Peck*, it was stated by the Chief Justice, that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, "if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion that a state statute, which devests a vested right, is repugnant to the Constitution of the United States; and the case in which that opinion was pronounced was removed into this court by writ of error, not from the supreme court of a state, but from a circuit court.
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> . . . .
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> We do not mean in any respect to impugn the correctness of sentiments expressed in those cases, or to question the correctness of a circuit court, sitting to administer the laws of a state, in giving to the constitution of that state a paramount authority over a legislative act passed in violation of it. We intend to decide no more than that the statute objected to in this case is not repugnant to the Constitution of the United States, and unless it be so, this court has no authority, under the 25th section of the judiciary act, to re-examine and to reverse the judgment of the supreme court of Pennsylvania in the present case.[163]

Similarly, in *Watson v. Mercer*[164] another case arising by writ of error from the Pennsylvania Supreme Court, the Court (per Justice Story) distinguished between a claim based on the contract clause from one based on the general principle of vested rights and held that, by virtue of the division between federal and state judi-

161. *Id.* at 414.
162. *Id.* at 412-14.
163. *Id.* at 413-14.
164. 33 U.S. (8 Pet.) 88 (1834).

cial authority, the second claim was beyond the Court's power to review:

> Our authority to examine into the constitutionality of the act of 1826, extends no farther than to ascertain whether it violates the Constitution of the United States; for the question whether it violates the constitution of Pennsylvania is, upon the present writ of error, not before us.
>
> . . . .
>
> The argument for the plaintiffs in error is, first, that the act violates the Constitution of the United States, because it divests their vested right . . . secondly, that it violates the obligations of a contract. . . . As to the first point, it is clear, that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property.[165]

To establish the boundary between federal and state jurisdiction, the Court therefore relied on the absence of an express federal prohibition against takings of "property" by the states.[166]

The distinction drawn by the Court between protecting vested rights of property and rights vested by contract in order to limit the scope of its appellate jurisdiction in federal question cases explains the emphasis on the express character of federal constitutional restrictions on state power evident in the cases after *Ogden v. Saunders*.[167] As an express provision construed more narrowly than the general constitutional prohibition against divesting vested rights, the contract clause was perceived to confine the occasions on which the Court was empowered by the Judiciary Act to review the decisions of the state supreme courts. Thus, without undermining the belief that all statutes divesting vested rights were unconstitutional as a matter of general constitutional principles, the Court held that the few express limitations on state power contained in the federal Constitution defined the instances in which the Court had authority to declare them so by reversing a decision of the state supreme courts. When the violation of one of the express provisions was required as a jurisdictional predicate for the

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165. *Id.* at 109-10.

166. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), which held the fifth amendment inapplicable to the states. That case, appealed under section 25 from the Maryland Court of Appeals, was also decided in a jurisdictional context. *See also* Proprietors of the Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 539, 580, 582-83 (1837) (no federal judicial power to protect vested rights unless the obligation of a contract impaired; takings of private property and compensation therefore a matter of local jurisdiction).

167. 25 U.S. (12 Wheat.) 213 (1827).

exercise of the Supreme Court's appellate power over state court decisions, the Court's authority was limited, and it could not protect all vested rights by applying for itself principles understood to inform the constitutional law of the states. When sitting to review cases where the federal jurisdictional predicate was diversity of citizenship, however, the Court could act as though it were a court of general jurisdiction and apply for itself the general principles of constitutional law which, as these were understood after *Ogden*, protected vested (but not substantive) rights.

In interpreting the contract clause to protect only a subset of all vested rights, the Court analogized it to the *ex post facto* clause which, when read to apply only to criminal statutes, was also conceived to limit federal jurisdiction over state interference with vested rights.[168] In a separate opinion and appendix in *Satterlee*, Justice Johnson took the occasion to argue that *Calder v. Bull*[169] had been wrongly decided, and that the *ex post facto*, bill of attainder, and contract clauses should be read as a mandate for the Court to protect all vested rights, regardless of the jurisdictional predicate in the case.[170] Even the dissenters in *Ogden*, however, rejected the complete merger of state and federal constitutional restrictions on behalf of individual rights which would follow from Johnson's argument, since it seemed to deny any area of state judicial autonomy over their own constitutional protection for individual rights.[171] In summing up the Court's role in protecting individual rights against the states in the federal system, Sedgwick later reflected this concern for state judicial autonomy by comparing the states' power to divest vested rights (not covered by the contract clause) to their power to violate their own express constitutional provisions:

> [S]o far as regards the legislation of the several States, the courts of the United States have no right to interfere by virtue of the restraining power of the Federal Constitution, except in the two cases of *ex post facto* laws, and laws impairing the obligation of contracts. The States may pass retrospective laws, however unjust; pass acts of a judicial nature, however clearly overstep-

168. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

169. *Id.*

170. Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 414-16, 681-87 (1829). Johnson had made a similar argument in *Ogden*, 25 U.S. at 286.

171. Marshall and Story joined in the Court's *Satterlee* opinion and Marshall joined in Story's opinion for the Court in *Watson*. Marshall also wrote for a unanimous court in Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

> ping the line of legislative power; they may pass acts divesting vested rights; they may violate express provisions of their own Constitutions;—acts of these classes, however objectionable, are not within the scope of the restriction of the Federal Constitution, and give no right of appeal from the decisions of the State tribunals. Questions of this nature can only be presented in the Supreme Court of the United States in cases arising in the circuit courts, within the jurisdiction given to them under the Constitution of the United States, and where, consequently, the circuit courts exercise all the powers of the State tribunals.[172]

The independent significance of the contract clause as a written constitutional restriction was therefore realized only after *Ogden* in the distinction drawn by the Court in *Satterlee* and *Watson* between rights vested by contract and vested rights of property. The importance of that distinction lay in the decision to limit federal judicial authority over the protection of vested rights. It therefore embodied a solution to a different role problem (federal courts/state courts) from that solved by the decision for vested rights (court/legislature). Thus, rather than reflect a jurisprudential shift, the disappearance of express endorsements of the general principle of vested rights in the contract clause cases indicated a decision to limit federal jurisdiction over vested rights by reading the contract clause to authorize appellate review (in federal question cases coming from the state supreme courts) over only a subset of all vested rights.

Additional evidence for this proposition exists in the Court's continuing practice of enforcing vested rights as a general principle of constitutional law, independent of positive restrictions, in diversity cases appealed from the circuit courts where the Court was understood to have jurisdictional authority equivalent to the state courts. In these cases, the question about the limits of the Court's authority to protect vested rights, resolved in favor of express restrictions in the contract clause cases on the basis of the Court's limited appellate jurisdiction, reappeared in the guise of discussions about whether the principle of vested rights was a general feature of republican government or simply a consequence of the express provisions of the various state constitutions.

Justice Chase's opinion in *Calder v. Bull*[173] provides an early example. Chase began his analysis with the "self-evident proposi-

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172. T. SEDGWICK, *supra* note 83, at 603-05.

173. 3 U.S. (3 Dall.) 386 (1798).

tion, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions, which are not expressly taken away by the constitution of the United States."[174] He later concluded that the *ex post facto* clause applies only to criminal legislation and that therefore the federal Constitution did not prohibit the statute. Thereafter, he noted the problematic character of the Court's assuming jurisdiction to pass on the validity of the act under the constitution of Connecticut, concluding that even if it had jurisdiction, it was clear that the state constitution had not been violated.[175] Yet after dismissing both sources of express restrictions, Chase was not finished; he ended by inquiring into whether the act of the Connecticut legislature divested a vested right—the sort of inquiry that was later explicitly understood as appropriate in diversity cases (such as *Calder*) when the Court had jurisdictional authority equivalent to the state courts to apply the general principles of constitutional law "derived from the nature of republican government."[176]

The idea that the Court could consider all claims to vested rights in diversity cases sustained (at the federal level) ambiguity regarding the appropriate authority for application of the principle of vested rights (textual or non-textual) throughout the antebellum period, even after the Court rejected the application of the entire doctrine through express *federal* restrictions. When the Court in *Satterlee*, for example, affirmed the portion of *Fletcher v. Peck*[177] rationalizing the protection of vested rights as a consequence of the "nature of society and of government" for subsequent application in diversity cases, it made no attempt to show that the principle of vested rights had been expressly authorized by the Georgia Constitution or adopted by its own courts.[178] It did note that some other federal cases applying the principle of vested rights "were founded, expressly on the constitution of the respective states in which those cases were tried."[179] Similarly, Story noted the issue one year before writing *Watson*, in his *Commentaries*:

> There is nothing in the constitution of the United States, which forbids a

174. *Id.* at 387.
175. *Id.* at 392-93.
176. *Id.* at 394.
177. 10 U.S. (6 Cranch) 87 (1810).
178. Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 414 (1829).
179. *Id.*

state legislature from exercising judicial functions; nor from divesting rights, vested by law in an individual; provided its effect be not to impair the obligation of a contract. If such a law be void, it is upon principles derived from the general nature of free governments, and the necessary limitations created thereby, *or* from the state restrictions upon the legislative authority, and not from the prohibitions of the constitution of the United States."[180]

Writing in 1857, Sedgwick manifested the ambiguity in his support for the principle of vested rights. Although considering himself a staunch proponent of "written law" and an ardent foe of judicial authority to declare "the doctrines of natural law and abstract right," Sedgwick defended the practice of the state courts and the Supreme Court (in diversity cases) of protecting vested rights "which do not come within the prohibition of the positive clauses in our Constitution, State or Federal."[181] Although noting the increasing tendency to enforce the states' "law of the land" and "due process" clauses to protect individual rights, Sedgwick made a point of showing that the "rather speculative questions" raised under those provisions could be better understood by reference to the principle of vested rights:

And this brings us to the precise question of vested rights; for the prohibition, so far as it exists, of retrospective acts, whether direct or in the shape of repealing statutes, and the non-interference, so far as it is enforced, with vested rights, in cases which do not come within the prohibition of the positive clauses in our Constitution, State or Federal, in regard to private property and contracts, will be found to be summed up in the idea that the legislature can *only make laws*, or legislative enactments, as contradistinguished from judicial sentences and decrees.

If we renounce, as I think we must, the idea that the validity of law can be determined by the judiciary on abstract notions of justice and right; if we admit, as we must, that the denial of the right to make retrospective laws cannot, as a universal proposition, be maintained,—then outside of the cases depending on positive constitutional inhibitions, no other restriction can be imposed on legislative action except such as is derived from the idea, perhaps, as we have said, expressed with equal clearness in the guaranty of the law of the land, that *legislative* power only is granted to it, and that vested

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180. J. STORY, *supra* note 143, § 1392, at 266-67.

181. T. SEDGWICK, *supra* note 83, at 604. *See also supra* text accompanying note 174.

> Whatever the glories of our past history, however grand our present, however brilliant our future, it is in vain to suppose that American freedom can be maintained except just so long as our people shall exhibit the capacity justly and intelligently to administer, and the disposition steadily and loyally to obey the government of WRITTEN LAW.

T. SEDGWICK, *supra* note 83, at 663.

> rights of property can only be interfered with by it so far as is competent to be done by the enactment of *laws*.
>
> This, however, is merely a circuitous statement of the proposition that vested rights are sacred.[182]

Writing in 1868, Cooley reported (and himself perfected) the absorption of all vested rights into the states' due process and law of the land clauses. With this accomplished, he could state authoritatively:

> In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States.[183]

In effect, Cooley resolved the ambiguity after rendering it a distinction without a difference. Nonetheless, the point remains the same: the importance of the dispute about support for the principle of vested rights on textual or non-textual grounds at the state constitutional level, like the earlier dispute at the federal level, was subordinate to the continued understanding that either approach supported judicial protection for only vested rights against the state.

The impact of jurisdictional concerns on the contract clause can therefore be summed up in the limited federal protection for vested rights enforced by the Court in deference to its limited jurisdiction over cases appealed from the state courts. This development, which left part of the realization of the general principle that "vested rights are sacred" to the state courts, did not undermine the sense in which the legal elite understood the entire corpus of constitutional protections for individual rights to be unified around the conception of the judicial role prescribed by the concept of vested rights. Although disputes about the cases in which it was appropriate to refer to principles outside the scope of express federal or state constitutional provisions affected the division of power over individual rights between the state and federal

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182. T. SEDGWICK, *supra* note 83, at 649.

183. T.M. COOLEY, *supra* note 46, at 87. *See* Chapter XI, entitled *Of the Protection to Property by the "Law of the Land"*. "[T]he phrase 'due process [or course] of law' is sometimes employed, and sometimes 'the law of the land,' and sometimes both; but the meaning is the same in every case." *Id.* at 353.

judiciaries, they occurred within a more general understanding of the concept of vested rights as the determinant of the legitimate judicial role in protecting individual rights against the state. The decision to limit the scope of the contract clause to its "express" parameters thus embodied a solution to a separate problem of federal jurisdiction which, although an important influence in subsequent contract clause litigation, did not indicate a further ebb or flow in beliefs about natural law or positivism to which it makes sense to attribute the development of antebellum rights against the state.

III. The Enforcement and Breakdown of Vested Rights Under the Contract Clause

The decision for vested rights thus represented the dominant conception among the legal elite of the judicial role in defining individual rights against the state. Its purpose was to legitimate judicial review of individual rights by confining it to the protection of the interest generated when individuals relied upon the standing law. This limitation purported to structure judicial review so that decisions to protect individual rights against the state would not reproduce the sort of judgments—about the substantive fairness or reasonableness of legal rules—thought to distinguish legislative choice.

The problem which eventually surfaced in enforcing vested rights was that the Court was forced to make the same kind of choices that it thought it had rejected by not extending the contract clause to protect substantive rights. Generally, it became increasingly understood that the notion of reliance on the standing law contained no *logical* stopping point short of freezing the entire existing regime of legal rules. Since it was *always* possible to argue that a newly enacted statute (whether retrospective or prospective) interfered with a right defined by the standing law upon which an individual had relied, the Court found itself forced to protect only *some* existing rights, chosen from the universe of those defined by the standing law. And because the decisions about *which* rights vested against the subsequent exercise of legislative power required more than the protection of the "neutral" reliance interest, it began to recast judicial review of individual rights around doctrines which directly acknowledged review of the substance of legislative choice.

That the concept of vested rights is unlimited, and hence incapable of generating a coherent boundary between legislative power and individual rights, seems to be a commonplace of modern legal thought.[184] Moreover, this insight appears to have had its origin in the critique of the concept of vested rights as it had developed by the early twentieth century. In a 1927 article, for example, Bryant R. Smith saw the following as obvious:

> [I]f . . . a law is retrospective which extinguishes rights acquired under previously existing laws, then all exercises of the police power, and indeed, all laws of any kind whatsoever, are retrospective. There is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for.[185]

The historical task is therefore to show how this understanding emerged from the actual experience of the legal elite in enforcing vested rights in the nineteenth century. Before describing that process, however, it is useful to begin with a theoretical presentation of the reason why the notion of protecting only "existing entitlements" does not make it possible to avoid the substantive judgments the Court sought to reject in limiting judicial review to vested rights.

The theoretical statement of the incoherence of the concept of vested rights is facilitated by a Hohfeldian description of the concept of a legal order. In a now famous article, Hohfeld developed

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184. *See, e.g.*, Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216 (1960). Slawson distinguishes between "vested-rights" and "method" retroactivity. Vested-rights-retroactivity conceives as retroactive any law which acts upon an existing legal entitlement. Method-retroactivity conceives as retroactive only those laws which make "present rights and duties depend upon past events." Slawson argues that the category of vested-rights-retroactive laws is illimitable and includes laws ordinarily thought of as prospective. He therefore concludes: "To ask whether a law is vested-right-retroactive is only to restate the question of its sufficiency in light of substantive due process. Vested-rights-retroactivity is a superfluous category." *Id.* at 251. Slawson also argues that whether a statute is method-retroactive is "largely irrelevant." Although it may indicate whether a party had the opportunity to make a choice that could have averted a legal consequence now attached to a past action, the range of factors relevant to the permissibility of the current imposition is such as to swamp the importance of the opportunity for choice. Moreover, Slawson notes that the distinction between "vested-rights" and "method" retroactivity is at best tenuous; if the "past events" to which legal consequences are conceived to attach are defined broadly enough to include any act or omission undertaken in reliance on the legal regime, then the category of method-retroactive laws would include all those that would be included as vested-rights-retroactive. Hence, Slawson concludes that any attempt to create special rules for retroactive statutes represents "wasted effort." *Id.*

185. Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 (1927).

an exhaustive vocabulary to describe the entire universe of possible modes of entitlement in a legal order which presupposes a legitimate and efficacious state.[186] He then erected those entitlements into a table of jural correlatives which, alone or in combination, describe the logical possibilities of *any* legal relation protected by that order. The table appeared as follows:

JURAL CORRELATIVES			
right	privilege	power	immunity
duty	no-right	liability	disability[187]

Besides providing a convenient vocabulary to serve the formal purpose of analytic clarity, Hohfeld used this vocabulary to teach a substantive lesson which has since become a staple of modern legal thought. The lesson was that privilege/no-right relations were as real, and as much a consequence of the legal order, as were right/duty relations. Corbin later put the point as follows:

> [O]ne who thinks that there can be no rule of law and no jural relation between men without societal constraint seems to insist that law does nothing but *command*. There is no doubt that the command element is of the utmost importance; and according to Hohfeld's classification this element is the factor that defines rights and duties. But it also seems to some of us that society not only commands but also *permits*. . . . The rules that determine these permissions . . . are rules that law schools have to teach, that lawyers have to use in advising clients, and that courts have to create and apply in rendering judgments. And this is true whether there is any societal command or constraint then existing or not.[188]

The important substantive lesson of Hohfeld's insight for the notion of entitlements defined at any given moment by the standing law is that if one counts *all* the entitlements defined by a legal order one discovers that any legal order defines not only *a* set of legal relations, but rather a *complete* set of legal relations which governs the legal consequences of all activity. This discovery may be denominated the rule of completeness of any legal order: instances which appear "ungoverned" by the legal order are in fact

186. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

187. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 186, at 36.

188. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226, 237 (1921).

cases in which the state, by not prohibiting certain activity, creates a legal privilege to engage in the permitted action.[189]

Moreover, since there is no reason not to attribute privileges to the standing law, there is also no reason to discount reliance upon them. To take a recent example, it would simply be a confusion to say that existing FCC regulations do not create a legal relation between a seller of home decoders of pay TV signals and the operator of the station because they do not define a right/duty relation prohibiting the sale. Instead, it would be accurate to say that the regulations define a privilege/no-right relation which creates the legal permission to sell the decoders. And once the relation is defined in this fashion, it becomes clear that a subsequent change in the regulations would operate to upset an existing legal entitlement, the privilege, no less than would a law designed to repeal a Hohfeldian right.[190]

The rule of completeness of any legal order illustrates clearly the incoherence of a mode of judicial review which claims to protect reliance on the standing law by disallowing legislative alteration of existing rights. Since the standing law defines a complete set of entitlements, it is impossible to protect all those "existing" without freezing the entire legal regime. Were the legislature to create any new rule, it would necessarily act to *change* an existing legal relation and not to create one where one did not exist before. Because the law current *before* the exercise of legislative power defines a complete set of legal relations, to exercise *any* legislative power is to change the existing distribution of entitlements.[191]

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189. Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 760 (1980).

> Entitlement abhors a vacuum. Covering any act that anyone can be imagined to do or suffer, there is *always* either a privilege or a right, therefore *always* either a duty or a no-right. The agent either is legally sanctionable for the act or omission (*i.e.*, has a duty) or she is not (*i.e.*, has a privilege); a victim either can secure relief(*i.e.*, has a right) or he cannot (*i.e.*, has a no-right). There is no undistributed middle.

Id.

190. Similarly, to discount reliance upon privileges would be to render unintelligible the concept of *ex post facto* criminal legislation. What *is* protected by the *ex post facto* clause is the Hohfeldian privilege, defined by the standing criminal law, to engage in conduct not defined as criminal. More generally, reliance upon the "innocence" of certain conduct is the same as reliance on a privilege defined by the legal order to act without legally binding consequence.

191. Hohfeld's table of jural opposites defines the logical possibilities of such a change and simultaneously demonstrates that the creation of any one of the entitlements requires

The demonstration of the incoherence of a mode of judicial review based on the concept of vested rights through Hohfeldian analysis and its implication for the completeness of any legal order is of more than analytic interest. In noting that "all laws . . . whatsoever . . . extinguish rights, powers, privileges, and immunities acquired under previously existing laws," Smith seems to have had in mind precisely the argument developed above.[192] The analysis therefore demonstrates a conclusion actually drawn by the legal elite after the gradual emergence into legal consciousness of the kind of analysis given formal expression by Hohfeld: the emergence of the modern analysis of legal relations undermined the concepts which had previously structured vested rights review.

The most complete view we have of the doctrines which made vested rights review plausible to the nineteenth century legal elite is contained in Cooley's *Constitutional Limitations*.[193] In his chapters on the contract and due process clauses, Cooley summed up antebellum wisdom about the constitutional protection of individual rights by attempting to collate and rationalize the cases into a coherent structure. The classifications he employed to determine whether legal interests were vested or not provide a clear picture of the boundary doctrines whose demise in late nineteenth century legal thought exposed the incoherence of the concept of vested rights.

At the core of Cooley's presentation were two categorical distinctions which defined the boundaries of vested rights. The first was that between "property" interests and "interests in expectancy":

> And it would seem that a right cannot be considered a vested right, unless it is something more than a mere expectation, and has already become a title,

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the negation or "repeal" of its opposite, as defined by prior law:

JURAL OPPOSITES

right	privilege	power	immunity
no-right	duty	disability	liability

Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 186, at 36. Further, the change of any one of the entitlements to its opposite also necessarily entails the change of the correlative to which it is related. (Changing A's right to a no-right entails changing B's duty to a privilege; changing A's disability to a power entails changing B's immunity to a liability, etc.).

192. Smith, *supra* note 185, at 137.

193. T.M. COOLEY, *supra* note 46.

> legal or equitable, to the present or future enjoyment of property, or the present or future enforcement of a demand, or a legal exemption from a demand made by another. As Mr. Justice Woodbury expresses it, acts of the legislature cannot be regarded as opposed to fundamental axioms of legislation, "unless they impair rights which are vested; because most civil rights are derived from public laws; and, if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee."
>
> To particularize: a *mere expectation of property in the future is not a vested right.*[194]

The second was the distinction between "rights" and "remedies":

> *[T]he right to a particular remedy is not a vested right.* This is the general rule; and the exceptions are of those peculiar cases where the remedy is a part of the right itself. . . .
>
> . . . .
>
> . . . Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made.
>
> It has accordingly been held that laws changing remedies for the enforcement of legal contracts will be valid, notwithstanding the new remedy is less convenient than the old, or less prompt and speedy.
>
> . . . .
>
> But a law which deprives a party of all legal remedy must necessarily be void.[195]

Surrounding these core distinctions were various qualifying doctrines such as the requirement that a law changing a remedy leave a "substantial" remedy in its stead. At the periphery of the vested rights logic was the doctrine of "no vested right to do wrong," applied where it did not appear possible to resolve the cases without direct consideration of the equities of the parties. As one moved from the core to the periphery, the doctrines became increasingly controversial,[196] but the resulting disputes did not threaten the basic structure. The classification of legal interests into rights and remedies and property and expectant interests constituted the conceptual apparatus informing the belief that there was an underly-

194. *Id.* at 359 (citations omitted).

195. *Id.* at 361, 286-87, 289 (citations omitted).

196. *See, e.g.*, the dispute between Cooley and Sedgwick over the "no vested right to do wrong" doctrine discussed *supra* at notes 89-92.

ing objective legal analysis which determined whether a right was vested. Insofar as a vested right did not necessarily include the remedy for its violation and a legal interest did not vest in an individual until it became his "property," it was possible for the legal elite to avoid the conclusion that *all* statutes upset a legal interest upon whose continuance an individual could claim reliance.

The demonstration of the incoherence of the vested rights analysis by early twentieth century legal thinkers therefore can be understood as the result of the protracted breakdown of the central belief in the meaningfulness of those two categorical distinctions. Smith, for example, devoted much of his critique of vested rights[197] to an attack on the distinction drawn in the cases between statutes divesting rights and those "merely" altering remedies. Quoting Corbin's definition of a legal right as "the legal relation of A to B when society commands action or forbearance by B *and will at the instance of A in some manner penalize disobedience*," Smith revealed how the Hohfeldian analysis of legal relations understood entitlements to include, or perhaps more accurately, to be defined by, the remedy available under the standing law.[198] Employing Corbin's definition, Smith argued that the only principle to be divined from the cases was that the *extent* of the interference with existing entitlements determined the permissibility of any statute, a question *not* answered by the classification of legal interests into rights and remedies:

> "A right, in a legal sense, exists, when in consequence of a given fact the law declares that the person is entitled to enforce against another a claim, or to resist the enforcement of a claim urged by another." On this analysis, the right is not safe unless the remedy is also protected. The individual may not complain if for an old remedy the legislature substitutes a new one equally effective for his purposes, but where a remedy is extinguished or substantially impaired and no alternative remedy provided, whether we say the remedy is the right, or whether we recognize a distinction, the result is the same in either case, namely, that, without the remedy, the right, for practical purposes, is also gone. This is equally true whether the change be in procedure, rules of evidence, competency of witnesses, or any other branch of so-called adjective law.[199]

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197. *See supra* note 185 and accompanying text.

198. Smith, *supra* note 185, at 243 (quoting Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 167 (1919)).

199. Smith, *supra* note 185, at 243 (quoting Justice Slayton in Mellinger v. City of Houston, 68 Tex. 37, 45, 3 S.W. 249, 253 (1887)).

A similar breakdown occurred with respect to the distinction between "property" and "expectant" interests. In a 1925 Comment entitled *The Variable Quality of a Vested Right*, the author began by noting:

> "Right" is here used in its general sense; but by splitting the term into some of its component legal parts of "right," "power," "privilege," and "immunity," the nature of the interest is made more manifest. Property interests are no more than legal relations of lesser or greater value, any one of which may accurately be brought within the popular term, "private property."[200]

Insofar as the concept of property had come to include *any* legally protected interest, the writer argued, as had Smith, that whether a right had vested was a question of the extent to which "the rights of an individual" could be "subordinated to the prevailing views of justice," a question no longer answered by the application of the concept of "property":

> Is the property interest involved so sacred that it may not be impaired at all?
>
> . . . .
>
> . . . [W]e are driven to the conclusion that the term "vested right" . . . is one of convenience and not of definition. It cannot mean more than a property interest, the infringement of which would shock society's sense of justice. For the idea of a "vested right" is less legal than political and sociological. The traditions, mores, and instincts of a community determine it.[201]

The reconceptualization of the legal concept of property to include all legally protected interests, and the reconceptualization of legal interests as defined by the rules regulating the action or forbearance of courts in administering remedies led to the conclusion that the protection of rights as vested was substantive due process by another name.[202] As the basis in legal logic for the distinction between property and expectant interests and rights and remedies collapsed, it became manifest that all statutes upset existing legal entitlements, none of which had a higher priority in legal analysis. Hence it seemed inescapable that rights granted the appellation "vested" were those found deserving of protection on "other grounds":

> Any useful discussion of the subject is necessarily concerned with the separation of the good from the bad. What makes one retroactive law valid and another invalid?

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200. Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303 n.1 (1925).
201. *Id.* at 304, 307.
202. *See* Slawson, *supra* note 184, at 224-25.

. . . .

. . . It is submitted that the distinction between vested and non-vested rights, like that between rights and remedies . . . is of use primarily as a basis on which to classify decisions after they have already been reached on other grounds.[203]

A. *The Abstraction of the Property Right*

The history of the transformation of the concept of property in nineteenth century legal analysis is traced in a recent article by Kenneth Vandevelde.[204] Vandevelde shows the early nineteenth century conception of property as rooted in Blackstone's notion of "dominion over things."[205] Where property was not embodied in a tangible thing, as in the case of incorporeal hereditaments or choses in action, the law fictionalized a "thing" to explain away the exception. During the nineteenth century, however, judges in common law cases created and acknowledged property rights which could not easily be understood as either physical things or as one of the traditionally recognized fictional things. Vandevelde argues that as the exceptions mounted and the traditional categories became strained, judges increasingly came to view property rights as relations among persons and not as things.[206] By the beginning of the twentieth century, the concept of property had become entirely "de-physicalized," and as such became an all-inclusive term signifying any of the Hohfeldian legal interests.

A similar development can be traced in the constitutional cases.[207] *Campbell v. Holt*, a transitional case, illustrates the transformation.[208] In *Campbell*, a state constitutional provision suspending the operation of the statute of limitations in civil cases was applied against a party in whose favor the limitations period had run prior to the enactment of the suspension. The party whose liability under a previous contract had been thus revived chal-

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203. Smith, *supra* note 185, at 240, 246.

204. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325 (1980).

205. *Id.* at 328.

206. *Id.* at 330, 359-63.

207. For example, Sedgwick noted: "[I]t seems sufficiently clear, as a general rule, that the Legislature cannot interfere with existing rights of property; but when we leave the subject of vested interests in real estate or actual property in possession, we find the subject surrounded with difficulty." T. SEDGWICK, *supra* note 83, at 653-54.

208. Campbell v. Holt, 115 U.S. 620 (1885).

lenged the suspension as violative of his vested property rights under the federal due process clause.[209]

Prior to *Campbell*, there had been much litigation about whether a statute retroactively amending a limitations period could be applied without divesting a vested right. Cooley had argued that a change in the limitations period could not be applied to existing causes of action unless the amendment provided for a reasonable time for the affected party to try his rights in court. The idea appeared to be that a party whose claim would be extinguished had a chose in action that was his property no less than his house or his land:

> But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.[210]

Cooley also argued that a statute reviving a time-barred claim to tangible property was void as divesting the party now possessing the property of his "title":

> When the period prescribed by statute has already run, so as to extinguish a claim which one might have made to property in the possession of another, the title to the property, irrespective of the original right, will be regarded as vested in the possessor, so as to entitle him to the same protection that the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title.[211]

Campbell, however, presented a more difficult case. Since the statute had run to extinguish a debt and not to extinguish claim to the possession of land, the defendant's right *not* to respond in damages was not classifiable (traditionally) as "property." A divided Supreme Court applied the traditional classification and hence upheld the application of the provision to revive the time-barred debt. For the Court, Justice Miller wrote:

> It is much insisted that this right to defence is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.
>
> . . . .
>
> We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by

209. *Id.*
210. T.M. COOLEY, *supra* note 46, at 362 (citations omitted).
211. *Id.* at 365 (citations omitted).

> some more exact term, as the phrase itself is not found in the language of the Constitution.
>
> . . . .
>
> We are unable to see how a man can be said to have *property* in the bar of the statute as a defence to his promise to pay. In the most liberal extension of the use of the word property, to choses in action, to incorporeal rights, it is new to call the defence of lapse of time to the obligation to pay money, property.[212]

In a vigorous dissent joined by Justice Harlan, Justice Bradley attacked the Court's understanding of the term property and employed it in the sense of any valuable legal interest:

> That clause of the amendment which declares that "no State shall deprive any person of life, liberty, or property without due process of law," was intended to protect every valuable right which a man has.
>
> . . . .
>
> . . . It is not confined to mere tangible property, but extends to every species of vested right. In my judgment, it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large portion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself.
>
> Now, an exemption for a demand, or an immunity from prosecution in a suit, is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guaranties and that the other is not, seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperiled by an action against me for money, as it is by an action against me for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defence to such an action of the greatest value to me? If it is not property in the sense of the Constitution, then we need another amendment to that instrument. But it seems to me that there can hardly be a doubt that it is property.[213]

The debate in *Campbell* portrays the legal elite gradually acknowledging the incoherence of the principles of inclusion and exclusion provided by the conception of property as a thing. By 1909, James Barr Ames criticized *Campbell* as standing almost alone, and a 1918 California case cited decisions in twenty states as disapproving the distinction between limitations laws extinguishing debts and those extinguishing title to tangible property.[214] A 1919

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212. 115 U.S. at 628-29.

213. *Id.* at 630-31 (Bradley, J., dissenting).

214. J. AMES, 3 SELECT ESSAYS 569 (1909); Chambers v. Gallagher, 177 Cal. 704, 171 P. 931 (1918), both *cited in* Clark, *Adverse Possession of One's Own Debt*, 29 YALE L.J. 91, 92

Connecticut decision following *Campbell* provided the occasion for Charles E. Clark to return to the subject, and his analysis, entitled *Adverse Possession of One's Own Debt*, demonstrates the collapse in the understanding of the "physicalness" of property:

> We often think of a chose in action as a physical thing, but in reality it is an aggregate of rights, privileges, powers and immunities of the creditor of which the more important correlatives (duties, etc.) are in the debtor. But it must also be remembered that when A owns a physical thing he has only rights, etc. against X, Y, and Z.[215]

Having moved from the conception of property rights as embodied in things to the conception of property rights as embodied in legal relations among persons, Clark could then show easily the fundamental similarity between the legal privilege of an adverse possessor of chattels and choses: "[T]he relations are so nearly identical as logically to require similar rulings in the absence of a compelling reason of policy."[216]

Another example of the effect of the abstraction of the property right is contained in the history of the distinction initially drawn by the Court between retrospective laws which enlarged rather than diminished the obligation of contracts. In *Satterlee v. Mathewson*,[217] the Court upheld a law retroactively validating a contract previously held void under the common law of Pennsylvania: "[I]t surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing."[218] Similarly, in *Watson v. Mercer*, the Court upheld a law retroactively validating the conveyances of property by married women previously void for the failure to observe certain requirements on the ground that it "confirmed" rather than impaired the obligation of contracts.[219] By the end of the century, however, the Court was at least implicitly assuming that enlarging the obligation of contracts violated the contract clause as much as diminishing it.[220]

The jurisdictional boundary drawn in *Satterlee* and *Watson* between rights vested by contract and vested property rights made

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n.4 (1919).

215. Clark, *supra* note 214, at 92 n.6.
216. *Id.* at 92.
217. 27 U.S. (2 Pet.) 380 (1829).
218. *Id.* at 413.
219. 33 U.S. (8 Pet.) 88, 111 (1834).
220. Hale, *supra* note 1, at 514-16.

the issue in those cases easier for the Court. Although the right to avoid liability under the law as it existed prior to the challenged statutes might have been viewed as a property (if not contract) right, the jurisdictional boundary placed that issue beyond the purview of the Supreme Court. Cooley, however, in discussing both the state and federal cases, had to explain why, if the statutes did not violate the contract clause, they did not in any case divest a vested property right.

Cooley treated these and similar cases upholding what were labelled "curative acts" imposing additional liabilities by classifying *defenses* to legal liability separately: "[A] *party has no vested right in a defence based upon an informality not affecting his substantial interests.*"[221] The idea appears to be that the defenses themselves were not property unlike the claims of liability which were vested rights (or choses) in action. The only difficult case for Cooley was therefore the case in which a statute, by extinguishing a defense previously available under the law, had the effect of transferring title to property:

> Other cases . . . hold that, although [a] deed was originally ineffectual for the purpose of conveying the title, [a] healing statute may accomplish the intent of the parties by giving it effect. At first sight these cases might seem to go beyond the mere confirmation of a contract, and to be at least technically objectionable, as depriving a party of property without due process of law; since they proceeded upon the assumption that the title still remained in the grantor, and that the healing act was required for the purpose of divesting him of it, and passing it over to the grantee.[222]

Although a hard case because the right to the defense appeared to be embodied in a thing (as in the case of adverse possession of real property), Cooley nonetheless argued that the "curative" statute was permissible. Here he resorted to the distinction between "legal" and "equitable" title and argued:

> The right which the healing act takes away in such case is *the right in the party to avoid his contract*,—a naked legal right, which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. As put by Chief Justice Parker of Massachusetts, a party cannot have a vested right to do wrong; or as stated by the Supreme Court of New Jersey, "laws curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the

221. T.M. COOLEY, *supra* note 46, at 370.
222. *Id.* at 377-78 (citations omitted).

justice and equity of the case."[223]

Despite his not recognizing a general property right in defenses established by the standing law, Cooley employed an alternative rubric under which some defenses not embodied in traditional "property" might be held to create vested rights. Like Harlan and Bradley, he argued that a party released from paying a debt by the operation of the statute of limitations had a vested right not to respond in damages:

> As to the circumstances under which a man may be said to have a vested right to a defense, it is somewhat difficult to lay down a comprehensive rule. He who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the right is gone, and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation. [224]

The expansion of the concept of property to include any legal interest and the idea that "the impairment of a contract may consist in increasing its burdens as well as in diminishing its efficiency" thus developed together.[225] Both were ways of protecting what Hohfeld would later describe as privileges despite the absence of a legal "thing." The remaining step was to generalize from Cooley's argument that *some* defenses created vested rights to the argument that all defenses were equally vested from the standpoint of legal logic. With the passage of the fourteenth amendment and a general federal question jurisdiction statute, one route to this end involved the inclusion of "incorporeal" privileges into the constitutional definition of property.[226] Thus Holmes stated:

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223. *Id.* at 378 (citations omitted).

224. *Id.* at 369 (citations omitted).

225. Columbia Ry., Gas & Elec. Co. v. South Carolina, 261 U.S. 236, 251 (1923) (Sutherland, J.).

226. The enactment of the fourteenth amendment and a general federal question jurisdictional statute were held to federalize entirely the vested rights doctrine. *See, e.g.*, C.J. Waite's opinion in Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1877). Thompson later wrote:

> Prior to the adoption of the Fourteenth Amendment to the Federal Constitution, it was the sound doctrine that the Federal Constitution did not prohibit the States from divesting vested rights *unless those rights were vested by contract.*
>
> . . . .
>
> . . . The Fifth Amendment to the Federal Constitution . . . did not apply to the State governments, but was merely a restraint upon the agencies of the Federal Government. But the Fourteenth Amendment to the Constitution of the United States has changed all this by ordaining "Nor shall any state . . . deprive

> In *Campbell v. Holt*, 115 U.S. 620, in which it was held by a majority of the court that a repeal of the statute of limitations as to debts already barred violated no rights of the debtor under the fourteenth amendment, Mr. Justice Miller speaks as if the constitutional right relied on were a right to defeat a just debt. But the constitutional right asserted was the same that would be set up if the Legislature should order one citizen to pay a sum of money to another with whom he had been in no previous relations of any kind. Such a repeal requires the property of one person to be given to another when there was no previous enforceable legal obligation to give it. Whether the freedom of the defendant from liability is due to a technicality or to his having had no dealings with the other party, he is equally free, and it would seem logical to say that if the Constitution protects him in one case it protects him in all.[227]

An alternative route to the same end, for legal interests treated as "contractual," was the doctrine that a statute enlarging the obligation of a contract was as much a violation of the contract clause as one diminishing the obligation.

The abstraction of the property right thus meant that all Hohfeldian privileges would be viewed as "property" in their own right, independent of any connection with a "thing." Under either the property or contract rubrics, *every* instance in which a statute upset an existing defense now presented a hard case of the kind Cooley had perceived to exist only when the defense was embodied in a thing. It therefore seemed to a new generation of legal thinkers that the doctrine of "no vested right to do wrong" captured the sense in which the protection of any entitlement as vested necessarily required a judgment about the substance of the entitlement asserted. No longer able to use the classification "property" to exclude or disfavor certain entitlements defined by existing rules, the legal elite recast the "curative act" cases as those in which it seemed reasonable or fair to permit the legislature to make "small repairs":

> [I]n this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on

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any person of life, liberty or property without due process of law."

S. THOMPSON, *supra* note 27, at 79. Although there was no case explicitly announcing the federalization of the entire vested rights doctrine, this appears to be the perceived significance of the rate cases decided in 1877. These included Munn v. Illinois, 94 U.S. 113 (1877), in which jurisdiction was maintained despite the absence of a contract clause claim. The others were Stone v. Wisconsin, 94 U.S. 181 (1877); Winona & St. Peter R.R. Co. v. Blake, 94 U.S. 180 (1877); Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1877).

227. Danforth v. Groton Water Co., 178 Mass. 472, 476, 59 N.E. 1033, 1033 (1901).

fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics.

. . . .

. . . But however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of creation seemed small.[228]

B. *Rights and Remedies*

From the start of Constitutional protection for vested rights, the Court observed that extending protection to "remedies" as well as "rights" would have restricted the legislature's "exercise of its legitimate powers [to regulate] the . . . mode of proceeding in its courts."[229] On the other hand, the Court also argued that a statute

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228. *Id.* at 476-77, 59 N.E. at 1033-34.

229. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 349 (1827) (Marshall, J., dissenting). The early discussion of whether the contract clause protected remedies as well as rights was perceived to have implications for federalism as well as for the constitutional protection of individual rights. In agreeing with Marshall that "[I]f the remedy enters into the contract, then the states lose all power to alter their laws for the administration of justice," Johnson argued that the failure to distinguish between contract rights and remedies would undermine the conflicts rule that courts should apply *lex fori* to remedial or procedural matters and *lex loci contractus* to matters of substantive right: "The law of the contract remains the same everywhere, . . . but the remedy necessarily varies with relation to the laws of distributive justice known to the policy of each state severally." The logical link perceived between the right/remedy distinction for purposes of determining which rights were vested and which were required to be enforced by a court situated in a state in which the contract was not made provides another example of the reification of rights as physical things. Conceiving a debt as a thing which either "existed" or did not, the Court in Campbell v. Holt cited the cases in which the conflicts rule had been applied so as to give a party the benefit of the statute of limitations of the forum state as evidence that his right to recover the debt was not extinguished by the running of the statute of limitations in the state in which the contract was made. 115 U.S. at 625-27. The dissenters, not conceiving the right as a thing, could not understand the logical connection between the conflicts rule and constitutional cases:

> It is said that the statutory defence acquired and perfected in one State or country is not, or may not be, a good defence in another. This, if it were true, proves nothing to the purpose. It is a vested right in the place where it has accrued, and is an absolute bar to the action there. This is a valuable right, although it may be ineffective elsewhere.

Id. at 631 (Bradley and Harlan, J.J., dissenting).

This argument was taken to its conclusion in Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933). He argued that the line between "rights" and

altering a remedy could extinguish an existing right no less than one which acted "directly" on the right. For example, Justice Story in *Green v. Biddle* noted:

> It is no answer, that the acts . . . now in question are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, so as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.[230]

Similarly, in the rehearing in *Green v. Biddle* Justice Washington wrote:

> [A] law which denies to the owner of land a remedy to recover possession of it . . . or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property.[231]

Nonetheless, the Court's hesitation in *Ogden* to decide whether the contract clause protected remedies as well as rights ended in *Mason v. Heile*, where it upheld a legislative discharge of a debtor from prison on the ground that "[s]uch laws act merely upon the remedy, and that in part only."[232] Thus, while hesitating to hold that all remedial changes were necessarily permissible, the Court accepted Marshall's notion that "the distinction between the obligation of a contract, and the remedy . . . exists in the nature of

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"remedies" or "substance" and "procedure" in contract clause and conflicts doctrine could be drawn only by reference to the different purposes of each doctrine. *See also*, Clark, *supra* note 215, at 96.

230. 21 U.S. (8 Wheat.) 1, 15 (1823).

231. *Id.* at 75-76 (1823). The statements in Green v. Biddle, however, are subject to a qualification. There, the contract bringing the case within the contract clause was a compact by which Kentucky (formed out of territory belonging to Virginia) agreed to determine by the then existing laws of Virginia all "private rights and interests of lands . . . derived from the laws of Virginia." *Id.* A Virginia claimant sued in ejectment to recover possession from a Kentucky occupant. Since ejectment at common law was viewed as a "local" action, venue would have not have existed in a state other than Kentucky. In this respect, ejectment was different from actions *ex contractu* which were viewed at common law as "transitory" actions that could be brought outside the locality whose law governed the claim. Hence, the logical inconsistency felt to exist between holding that contract remedies "vested" and that a forum state could apply its own remedial law would not have been felt in Green v. Biddle, where, under existing venue practice, there was no possibility for the claim to be brought in another state. This might explain why, until the end of the nineteenth century, the Court did not see as supported by the same reasoning the arguments that "a law which affects the remedy for the recovery of land impairs the right to the land" and that "a law which affects the remedy for enforcement of a contract . . . impair[s] the obligation of that contract." Hale, *supra* note 1, at 538.

232. 25 U.S. (12 Wheat.) 370, 378 (1827).

things," and that therefore remedies were not protected in the same way as were rights.[233]

In *Bronson v. Kinzie*,[234] the Court voided a law expressly acknowledged as altering the remedies available for enforcing existing contracts. It was, however, careful to note that not all changes in remedial laws affecting existing contracts were void:

> If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future.[235]

Rather than equate remedies with rights, the Court argued that some remedial changes may, "in effect," destroy rights by taking "away all remedy to enforce them, or encumber[ing them] with conditions that rendered [them] useless or impracticable to pursue:"[236]

> Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself.[237]

Remedies were thus not necessarily protected (as were vested *rights*), but in particular cases a change in the remedy might be held to impair a right where the change made enforcement of the right impossible or difficult.

Cooley rationalized the cases by classifying statutes acting only on the remedy into a hierarchy of sorts; he argued that one had no vested right to a *particular* remedy, except in "those peculiar cases where the remedy is a part of the right itself."[238] These were the contract clause cases where "it is evident that substantive rights were affected" or where, when "the laws . . . operated upon the remedy, they either had an effect equivalent to importing some new stipulation into the contract, or they failed to leave the party a substantial remedy."[239] Cooley then discussed under separate

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233. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200-01 (1819).
234. 43 U.S. (1 How.) 311 (1843).
235. *Id.* at 315.
236. *Id.* at 317.
237. *Id.* at 316.
238. T.M. COOLEY, *supra* note 46, at 361 (citations omitted).
239. *Id.* at 292-93.

headings limitation laws and laws altering the rules of evidence. The latter were so "separate" from rights, Cooley argued, that they might be applied to existing "causes of action, even in those States where retrospective laws are forbidden" because "the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future."[240] Changes in statutes of limitations as to existing causes of action were generally only remedial (so long as a reasonable time was permitted for the party to bring suit), but a statute reviving a time-barred claim to property appeared to go beyond the remedy so as to infringe a right: "The right being gone, of course the remedy fell with it; and as there could be no remedy without a corresponding right, it was useless for the legislature to restore the former, so long as it was prohibited by the constitution from interfering or meddling with the latter."[241]

The breakdown of the right/remedy distinction was reflected in the increasing criticism of the meaningfulness of the distinction in each of these contexts. Cooley's concession, for example, that in some cases the "remedy was part of the right"[242] appeared to be a response to cases such as *Von Hoffman v. City of Quincy*.[243] There the Court overruled a federal circuit court's denial of a writ of *mandamus* ordering the city to levy a tax sufficient to pay interest on previously issued bonds, despite a statute forbidding cities to tax above a certain rate to pay off the bonds. Justice Swayne, for the Court, thought the case illustrated the distinction between rights and remedies to be "one rather of form than substance."[244]

Sedgwick also had attacked the right/remedy distinction as employed in the contract clause cases:

> Notwithstanding the great weight of authority on the other side of the question, I am free to confess my entire inability to distinguish between the *obligation* and the *remedy* of a contract. . . . What, then, is in legal acceptation, the binding force of a contract? It certainly is not the mere, naked promise. It is not the moral duty. It is not the honor, nor fashion, that binds the con-

240. *Id.* at 367. Cooley then qualified this rule by noting that "under pretext of regulating evidence" a statute could not constitutionally "altogether preclude a party from exhibiting his rights," and then further qualified this by noting an exception for "cases which fall within the familiar doctrine of equitable estoppel at common law." *Id.* at 368.

241. *Id.* at 365 (quoting Knox v. Cleveland, 13 Wisc. 274, 278 (1860)).

242. T.M. COOLEY, *supra* note 46, at 361.

243. 71 U.S. (4 Wall.) 535 (1867).

244. *Id.* at 554.

> tracting party to keep his engagement. What is it then, but the remedy—the coercive remedy—which the law gives against the person or property of the defaulting party. . . . Take away the whole remedy, and it is admitted the contract is gone. How, then, if a material part of the remedy be taken away, can it be said that the obligation is not *impaired*?[245]

But Sedgwick was not willing to extend the argument to the entire body of rules that might be classified as remedial. He seemed to exclude laws modifying only "procedure:" "No one seeks to deny that the remedy should be to a certain extent under legislative control. Tribunals may be changed, procedure altered: these modifications do in no wise impair the remedy or prejudice the holder of a contract."[246]

The New Hampshire Supreme Court, however, pressed an explicit attack on the meaningfulness of the distinction in *all* contexts in *Kent v. Gray*.[247] In *Kent*, three persons brought an action in debt against a single defendant. It was decided, on demurrer, that an existing statute authorized the action to be brought by one person only. Shortly thereafter, the New Hampshire legislature passed a law, which in terms applied to existing suits, providing that "when two or more are joined as plaintiffs, the writ . . . may be amended by striking out the name of any plaintiff before the evidence is closed, or the case is submitted."[248] The plaintiffs moved to amend their writ, and their attempt to do so was challenged as violative of the New Hampshire constitutional provision prohibiting the legislature from passing retrospective laws, which that document proclaimed to be "highly injurious, oppressive, and unjust."[249]

Cooley had used *Rich v. Flanders*,[250] a previous decision interpreting the New Hampshire prohibition of retrospective laws, to demonstrate that changes in the rules of evidence applied to existing causes of action not only did not divest vested rights, but were not even considered as retrospective. In *Rich*, the New Hampshire Supreme Court had approved for application to existing causes of action a statute removing the common law disqualification of interested witnesses. Although recognizing that the

245. T. SEDGWICK, *supra* note 83, at 630.
246. *Id.*
247. 53 N.H. 576 (1873).
248. Chapter 39 of Laws of 1872.
249. 53 N.H. at 576.
250. 39 N.H. 304 (1859).

change might alter the outcome of suits on existing causes of action, the Court, citing cases distinguishing vested rights from remedies, concluded that "statutes affecting the remedy, though in fact retroactive, are not considered retrospective in the legal sense of that word."[251] It supported its decision with numerous quotations approving the exercise of legislative power over the rules of evidence and modes of proceeding in the courts.[252]

Justice Doe, who had joined the Court's decision in *Rich*, now wrote an opinion in *Kent v. Gray* declaring unconstitutional the application of the law permitting the amendment of writs to existing causes.[253] He rejected completely the distinction between rights and remedies by denying that it helped resolve the conflict between legislative power and vested rights in any of the contexts in which it had been employed:

> The principles of justice, declared by the prohibition of retrospective laws, are not evaded by words, names, and pretences. And when we have merely ascertained that a statute affects the remedy in some sense or other, we have made very little progress in the inquiry whether it affects a right, that is, whether it is unjust on general principles. If a certain change be made in the remedy, it is because it can be justly made: if a change cannot be made in the right, it is because it cannot be justly made.[254]

Understanding the categories to reproduce rather than resolve the problem, Doe recast the notion of retrospective legislation around the idea of "substantial equity."[255] His first target was Cooley's discussion of alterations in the rules of evidence:

> There is much authority for holding, in general terms, that a right to have one's controversies determined by existing rules of evidence is not a vested right. . . . But general statements of this kind are to be taken with the broad qualification that the changes must not infringe the general principles of justice.[256]

Giving an example of a law abolishing "the action of assumpsit, and substituting for it the action of debt," Doe also questioned whether the right/remedy distinction helped in deciding a "core"

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251. *Id.* at 319.

252. *Id.* at 316-17, 323-27.

253. 53 N.H. 576 (1873).

254. *Id.* at 579.

255. Doe offered two pages of reasons why, taking the prohibition against retrospective legislation "in the reasonable and equitable sense," an argument "might be made, in support of the doctrine of *Rich v. Flanders*, on very narrow ground." *Id.* at 576-78.

256. *Id.* at 578-79.

case involving the extent of the legislature's power over the modes of proceeding in the courts:

> [I]t is not apparent how the constitutional sense, in such a case, would be elucidated by a distinction between a right and a remedy. The injustice would be manifest; and the test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right and wrong.[257]

Finally, he attempted to use Cooley to his purpose by generalizing from the section on the vesting of defenses, where Cooley had recognized the existence of a few hard cases which could be decided only by direct resort to equitable principles:

> On other subjects, the ground of judicial decision is not ordinarily understood to be so broad as the general principles of justice: but, on this subject of retrospective legislation, those principles are the constitutional ground amply supported by the authorities. It is said that a defendant has no vested right in a defence based upon an informality not affecting his substantial equities, and that formal defects and irregularities may be cured by retrospective legislation. That is merely saying that the whole subject stands on the ground of substantial equity. What are formal and what are substantial defects in particular cases, may not be an easier problem than the application of the general equitable principle.[258]

As of 1873, however, the critique of the meaningfulness of the right/remedy distinction appears to have proceeded further in a state such as New Hampshire, where all retrospective legislation was prohibited,[259] than in the state or federal cases where the protection of vested rights was expressly linked to the protection of "property" interests. In those cases, it remained possible to argue that the interest upset by a retrospective alteration of a remedy was not a property interest and hence not a vested right. As the concept of property was expanded to include all legal interests, however, it became both more necessary and less persuasive to rely on the right/remedy distinction to determine which interests defined by the standing law vested.

In *Campbell v. Holt*,[260] for example, the Court distinguished the state cases voiding statutes reviving time-barred debts as based on those states' constitutional prohibition of retrospective legisla-

257. *Id.* at 579-80.
258. *Id.* at 580 (citations omitted).
259. N.H. REV. STAT. ANN. vol. 1 (1970).
260. 115 U.S. 620, 625 (1885).

tion. In addition to arguing that the defendant had no property in the bar of the statute, the Court argued that the extension of the limitations period affected only a remedy:

> There are numerous cases where a contract incapable of enforcement for want of a remedy, can be so aided by legislation as to become the proper ground of a valid action. . . .
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> . . . .
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> In all this class of cases the ground taken is, that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of public policy been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract, otherwise unobjectionable.[261]

But the dissenters, conceiving property as any valuable interest, could not understand why a defendant's right to his remedy was any less valuable than a plaintiff's right to his, which the Court had previously protected when striking down changes in remedial laws whose effect was to impair a right:

> The fact that this defence pertains to the remedy does not alter the case. Remedies are the life of rights, and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. This court has frequently held that to deprive a man of remedy for enforcing a contract is itself a mode of impairing the validity of the contract. And, as before said, the right of defence is just as valuable as the right of action. It is the defendant's remedy. There is really no difference between the one right and the other in this respect.[262]

The expansion of the concept of property thus produced in the state and federal cases, where the protection of vested rights was linked to the possession of "property," the same critique of the distinction between "rights" and "remedies" developed earlier in the states where all retrospective legislation was prohibited. Insofar as *any* law that changed an existing legal relation, whether called a law altering a right or a remedy, impacted on the value of that relation, it was now viewed as having authorized the appropriation of a party's property. Hence in *Danforth v. Groton Water Co.*, a case in which the Massachusetts legislature applied to existing causes of action a law altering the procedural requirements for recovering damages incurred in the exercise of the power of em-

261. *Id.* at 627.

262. *Id.* at 631 (Bradley and Harland, JJ., dissenting).

inent domain, the Massachusetts Supreme Court noted that the "distinction between the remedy and substantive right" did not alter the fact that the procedural change amounted to "requir[ing] the property of one person to be given to another when there was no previously enforceable legal obligation to give it."[263] The right/remedy distinction was there reconceived as a "device" to prevent "a written constitution from interfering with the power to make small repairs which a legislature naturally possesses."[264] Similarly, in *Dunbar v. Boston & Providence Railroad*, that same court said with respect to a statute extending the limitations period on certain causes of action:

> However much you may disguise or palliate the change by saying that the statute deals only with the remedy, or that a party has no vested right to a merely technical defence, or by adopting any other cloudy phrase that keeps the light from the fact, such legislation does enact that the property of a person previously free from legal liability shall be given to another who before the statute had no legal claim.[265]

The court in *Dunbar*, like the court in *Kent*, ultimately recast the idea of protecting existing entitlements against retrospective alteration as a matter of doing substantial justice: "[W]here . . . we cannot say that the Legislature with its larger view of the facts may not have been satisfied that substantial justice required its action, we are not prepared to pronounce the statute unconstitutional in the face of the most authoritative decisions."[266]

The collapse of the logic of vested rights can thus be understood as the demise in the meaningfulness of the boundary doctrines which made plausible the belief that judicial review of vested rights required review only of the "manner" in which the legislature had acted and not the substance of its action. At the core of this logic were the distinctions between property and expectant interests and rights and remedies. In what might be described as an intermediate "ring" surrounding the core, were the various qualifying doctrines holding, for example, that a law "substantially" impairing a remedy divested a right and that a defense did not vest unless it affected a party's "substantial" interests. In the periphery, but *only* the periphery, were the doctrines such as

263. 178 Mass. 472, 476-77, 59 N.E. 1033, 1034 (1901).
264. *Id.* at 477, 59 N.E. at 1034.
265. 181 Mass. 383, 385, 63 N.E. 916 (1902).
266. *Id.* at 386, 63 N.E. at 917.

"no vested right to do wrong," which acknowledged that a few hard cases could be resolved only by reference to "substantial equity."

Cooley presented all this as the natural extension of the judiciary's function in applying the standing law so as to protect individual rights.[267] But as the critique of the meaningfulness of the core distinctions accumulated, the doctrines once applicable only in the periphery became increasingly relied upon to resolve the cases. The reconceptualization of the legal concept of property to include any valuable legal interest and the reconceptualization of a legal right as an entitlement "to enforce against another a claim, or to resist the enforcement of a claim urged by another"[268] made it increasingly evident that in order to distinguish between legitimate and illegitimate exercises of legislative power, the courts would have to consider the substance of the entitlement claimed under prior law and the reasonableness of the challenged exercise of legislative power. The periphery came to engulf the core, and, short of freezing the existing law and disabling entirely legislative power, the protection of vested rights would now be viewed as incorporating a judgment about the substance of legislative power and individual right.

IV. The Transition from Vested to Substantive Rights

Against the backdrop provided by the erosion of the conceptual underpinnings of the logic of vested rights, it is possible to return with greater understanding to the late nineteenth century contract clause cases. The decisions undermining the doctrinal handiwork of the Marshall Court appear to be part of the process by which the late nineteenth century legal elite came to view the earlier doctrines as devices for judging the substance of individual rights and legislative power. One response was to free legislative power to upset some entitlements previously protected as vested rights and to protect others only to the extent that such protection was viewed as reasonable. A second was to recast individual contract and property rights as substantive rights against the state.

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267. T.M. Cooley, *supra* note 46, at 357-58.

268. Smith, *supra* note 185, at 243 (quoting Mellinger v. City of Houston, 68 Tex. 37, 45, 3 S.W. 249, 253 (1887)).

A. *Unraveling Contract Clause Doctrine*

In the analysis of the early contract clause cases, much attention has been directed to the Court's creativity in finding a contract in a land grant or corporate charter. As argued above, however, the distinct importance of the contract rubric was in establishing federal jurisdiction over certain vested rights. Neither Marshall nor Cooley, for example, thought that the determination that some governmental actions created contracts with individuals provided an intelligible boundary between individual rights and legislative power. The notion was simply too broad. Cooley put the point as follows: "[M]any things done by the State may seem to hold out promises to individuals, which after all cannot be treated as contracts without hampering the legislative power of the State in a manner that would soon leave it without the means of performing its essential functions."[269] Marshall made the same point in *Dartmouth College*:

> [I]s [sic] has been argued, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state, for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control.
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> . . . .
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> The general correctness of these observations cannot be controverted.[270]

The boundary doctrines actually utilized to decide the cases were therefore those discussed in the previous section. Of particular importance in the "legislative contract" cases was whether the interest claimed to have vested was conceived as "property." In *Fletcher v. Peck*, for example, Marshall distinguished instances in which a legislature could repeal an act of an earlier legislature from those in which it could not, according to whether the earlier act was "general legislation" or a conveyance "vesting a legal estate."[271] Johnson distinguished between acts concerning the "powers" and those concerning the "interests or property" of a nation, and argued that only the latter could create rights vested in indi-

269. T.M. COOLEY, *supra* note 46, at 276.
270. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 627, 629 (1819).
271. 10 U.S. (6 Cranch) 87, 135 (1810).

viduals.[272] Similarly, Marshall concluded in *Dartmouth College* that:

> [the] term "contract" must be understood in a more limited sense . . . to restrain the legislature in future [sic] from violating the right to property. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice.[273]

Finally, Justice Daniel, later sustaining for the Court a statute diminishing the compensation and term of office of public officers noted: "The contracts designed to be protected by the [contract clause] are contracts by which *perfect rights, certain definite, fixed private rights* of property, are vested."[274]

From this perspective, it is possible to see why *Fletcher* presented a relatively easy case, and why Marshall could refer to the "vesting" of the land as a matter of "fact." Since the right claimed in that case was embodied in real property, there was little dispute over whether it had vested. Roughly similar is *Terret v. Taylor*,[275] in which the legislature of Virginia, by repeal of an act confirming to the Episcopal Church title in glebe lands, sought to "vest the property of such corporations in the state, or dispose of same to such purposes as it . . . please."[276] Far more difficult, however, was *Dartmouth College* itself.

The issue which appears to have presented the most vexing legal problem to the Court was whether the statute amending the charter of the college might be said to have divested someone of his legal property. The analytic problem with categorizing a corporate franchise was that it was both a grant of certain legal interests themselves difficult to classify as property as well as an authority for the corporation to hold and acquire traditional property interests. Marshall thought the most difficult question was whether the amendment of the charter interfered with anyone's *beneficial* interest in the corporate property. The "founders of the college" and the "donors of land" were "equally without interest," since they "have parted with the property bestowed upon [the corpora-

272. *Id.* at 143.
273. 17 U.S. at 629.
274. Butler v. Pennsylvania, 57 U.S. (10 How.) 402, 416 (1851) (emphasis in original).
275. 13 U.S. (9 Cranch) 43, 52 (1815).
276. *Cf.* Turpin v. Lockett, 10 Va. (6 Call.) 113 (1804).

tion.]"[277] Similarly, "the students are fluctuating, and no individual among our youth has a vested interest in the institution."[278] Finally, "the trustees, in whom the rights of all were combined, possessed no private individual beneficial interest in the property confided to their protection."[279]

Marshall acknowledged that in England, this argument would be dispositive "[h]ad parliament, immediately after the emanation of this charter, . . . annulled the instrument."[280] But he continued, by a kind of process of elimination, to argue that the situation was different in America with respect to "these eleemosynary institutions" which "do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant."[281] Marshall seems to be saying that wherever the beneficial interest in the corporation's property lay, it was not located in the government, in a case where the "donors and founders" had given their property for "the benefit of religion and literature."[282] The "body corporate therefore possess[ed] the whole legal and equitable interest [and] completely represent[ed] the donors, for the purpose of executing the trust . . . [and] has rights which are protected by the constitution."[283] Moreover, Marshall argued that since the trustees could, under the charter, appoint themselves to posts within the college, they might be said to possess a "beneficial interest" not entirely "unconnected" to their "freehold right in the powers confided to them."[284]

In a concurring opinion, Washington took a somewhat different tack, arguing that the corporate franchise itself was a species of property. Citing Blackstone, he noted:

> This franchise, like other franchises, is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within a thing corporate.
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> . . . .
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> . . .The subjects of the grant are not only privileges and immunities, but property, or, which is the same thing, a capacity to acquire and to hold prop-

277. 17 U.S. at 641.
278. *Id.*
279. *Id.* at 643.
280. *Id.*
281. *Id.* at 647.
282. *Id.* at 653.
283. *Id.* at 654.
284. *Id.*

erty in perpetuity.[285]

But holding the franchise "property" did not entirely resolve the case, since Washington agreed that the "trustees or governors" of a "civil" corporation would "have no interest" that would be violated by amendment or repeal of a charter "accepted . . . for the public benefit alone."[286] Hence Washington also argued that it was the private nature of the corporate purpose which determined that the property possessed by the corporation was vested: "With such a [private] corporation, it is not competent for the legislature to interfere. It is a franchise, or incorporeal hereditament, founded upon private property. . . . [A]ll of these powers, rights and privileges, flow from the property of the founder in the funds assigned for the support of the charity."[287]

Story argued similarly to Washington that the corporate franchise was itself a species of property, finding that "a grant of franchises is not, in point of principle, distinguishable from a grant of any other property."[288] To the objection that "no grants are within the constitutional prohibition, except such as respect property in the strict sense of the term; that is to say, beneficial interests in lands, tenements, and hereditaments . . . which may be sold by the grantees for their own benefit,"[289] Story responded: "There are many rights, franchises and authorities which are valuable in contemplation of law, where no beneficial interest can accrue to the possessor."[290] Analogizing the franchise to an avowsdon, an incorporeal hereditament "which cannot be legally sold to the intended incumbered," Story concluded: "The truth, however, is that all incorporeal hereditaments, whether they be immunities, dignities, offices, or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them."[291] In addition, Story argued that "whatever may be thought as to the corporators, it cannot be denied that the corporation itself has a legal interest in [the corporate franchise] . . . . [C]orporate franchises . . . are, properly speaking, legal estates vested in the

285. *Id.* at 657-58.
286. *Id.* at 661.
287. *Id.* at 661-62.
288. *Id.* at 684.
289. *Id.* at 698.
290. *Id.*
291. *Id.* at 699.

corporation itself as soon as it is *in esse*. They are not mere naked powers . . . but powers coupled with an interest. The property of the corporation vests upon the possession of its franchises . . . ."[292]

The private corporate franchise thus represented the most self-consciously "abstract" form of property held to vest in individuals. Legal interests not classifiable as traditional property seemed to become so by virtue of their embodiment in a corporate franchise. Equating a franchise and the interests created thereby with any other thing "deemed valuable in law"[293] came close to acknowledging that individuals may be said to have property in *all* their rights, a conception whose implications were later to contribute to the demise of the logic of vested rights. Washington's equation, for instance, of property with "a capacity to acquire and hold property in perpetuity"[294] could have undermined *Ogden* itself. The bankruptcy act, although applicable only to subsequent contracts, would have divested an existing property right if the creditor's power to acquire and hold property (defined by the standing law prior to the enactment of the bankruptcy act) was itself conceived as property.

The interests created by a private corporate franchise thus occupied a unique and problematic place in the regime of vested rights. Although conceiving of the franchise of a private corporation as property, Story acknowledged that in England the King could reserve a power "to alter or amend the charter, or devest the corporation of its franchises."[295] This acknowledgement highlighted the problematic character of holding that the franchise of a private corporation was property and hence protecting as vested rights all legal interests defined by the charter.[296] Unlike other vested property interests, rights granted by franchise were subject to alteration, amendment, and repeal where the power to do so was reserved. Cooley later rationalized the rule this way:

> Those charters of incorporation, however, which are granted, not as a part of the machinery of the government, but for the private benefit or purposes of

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292. *Id.* at 700 (emphasis deleted).

293. *Id.* at 699.

294. *Id.* at 657-58.

295. *Id.* at 675.

296. To the doctrine of reserved powers might be added that pertaining to the "strict construction" of corporate charters.

> the corporators, are held to be contracts between the legislature and the corporators, based, for their consideration, on the liabilities and duties which the corporators assume by accepting them; and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself.[297]

Where the power of repeal was reserved, however, the franchise itself "must be regarded as a mere privilege while it continues, and the legislature may recall it at any time, without affording any ground to claim redress."[298]

Of similar effect to the doctrine of reserved powers was the limitation on the legal interests that might vest by government grant derived from the idea that the legislature was not competent to "so bind up its own hands by a grant as to preclude it from exercising for the future any of the essential attributes of sovereignty in regard to any of the subjects within its jurisdiction."[299] In *West River Bridge v. Dix*,[300] for example, the Court permitted the taking of a bridge for a public highway despite the claim that the condemnation impaired the rights of the bridge owners under their charter. Arguing that the future exercise of the power of eminent domain was "implied" in every grant, the Court held that the corporation's chartered rights were no more protected from condemnation than any other property.[301] Also, in a series of cases beginning in the early 1850's, a number of Justices, although never a majority, objected to protecting tax exemptions granted to corporations as vested rights on the ground that such protection permitted the legislature to "bargain away" its taxing power.[302] Finally, the Court upheld legislation revoking a license to conduct a lottery,[303] a charter permitting the manufacture of liquor,[304] and a franchise to operate a factory at a particular location,[305] on the

297. T.M. COOLEY, *supra* note 46, at 279 (citations omitted).

298. *Id.* at 383-84.

299. *Id.* at 280.

300. 47 U.S. (6 How.) 507 (1848).

301. *Id.* at 531-33.

302. Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430 (1869); Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855); Ohio Life Ins & Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1853); Picqua v. Knoop, 57 U.S. (16 How.) 369 (1853).

303. Stone v. Mississippi, 101 U.S. 814 (1880). *Cf.* Boyd v. Alabama, 94 U.S. 645 (1877)(conducting lottery in violation of statute).

304. Beer Co. v. Massachusetts, 97 U.S. 25 (1878).

305. Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).

ground that the legislature could not bargain away its police power.

Cooley classified these federal cases and their state court analogs under a rule prohibiting the legislature from surrendering its inalienable powers of eminent domain, taxation, and police, immediately after discussing private corporate franchises as "property."[306] Like the doctrine of reserved powers, the doctrine of "inalienable sovereign powers" was applied to limit the vesting of rights granted by legislative enactment which, but for their embodiment in a private corporate franchise, would not have been protected as property. Protecting the franchise itself as property permitted the vesting in corporations of legal interests more "abstract" than those which could vest in individuals.

Nothing, however, in the early application of either the doctrine of reserved powers or inalienable sovereign powers, which constituted the legal terrain on which the battle over corporate privileges was fought, undermined the concept of vested rights. In the application of reservation clauses, for example, the Court consistently noted that such clauses did not permit the legislature to impair a contract made between a corporation and a third party or to divest the corporation of property vested in the exercise of the powers granted by the charter.[307] Similarly, nothing in the early application of the doctrine of the inalienable police power indicated that the Court would use it to hold as "non-vested" those rights which represented less controversial forms of property than a corporate charter.[308] In fact, when the Court held that the due process clause of the fourteenth amendment federalized entirely the vested rights doctrine, it noted that its effect was to put corporations and individuals on the same footing under the law, a signal

306. T.M. COOLEY, *supra* note 46, at 280-84.

307. Sinking Fund Cases, 99 U.S. 700 (1879); Shields v. Ohio, 95 U.S. 319 (1877); Holyoke Co. v. Lyman, 82 U.S. (15 Wall.) 500 (1873); Miller v. State, 82 U.S. (15 Wall.) 478 (1873); Tomlinson v. Jessup, 82 U.S. (15 Wall.) 454 (1873); Pennsylvania College Cases, 80 U.S. (13 Wall.) 190 (1872).

308. For example, the Court in *Beer Co.*, 97 U.S. at 32, noted that it was not applying the doctrine to divest "property actually in existence." It implied that liquor already manufactured under the charter would have become vested in the corporation. Similarly, Cooley, in his chapter on the police power, noted that "even a provision in a corporate charter, empowering the legislature to alter, modify, or repeal it, would not authorize a subsequent act which, on pretence of amendment, or a police regulation, would have the effect to appropriate a portion of the corporate property to the public use." T.M. COOLEY, *supra* note 46, at 578 (citations omitted).

that the boundary doctrines that would be applied to corporate interests would be the same as those applied to individuals.[309]

The irony of the Court's resolution of the problem of how to treat the vested rights of corporations through reliance on the traditional concept of property was that it occurred at roughly the same time as that concept was itself undergoing a transformation. The doctrines developed to put corporations and individuals on the same footing under the law achieved widespread acceptance at the moment at which it was becoming increasingly plausible to conceive of individuals as having property in all their legal interests. Thus the reliance on the traditional notion of property to protect only the choses in action acquired by a corporation in a "contract with a third party" or the "property" acquired by a corporation in the exercise of its granted powers increasingly did not help to resolve the cases concerning corporate vested rights any more than they helped to resolve the cases concerning individuals' vested rights. If the critics of corporate privilege were successful in demonstrating a bias towards corporations in the holding that all rights created by franchise were property, they were successful only at the moment it was becoming more difficult to see any valuable legal interest as something less than a property interest. Hence, rather than observing a trend towards simply cutting off vested rights protection for corporate interests other than traditional property, one can see in the cases a collapse into the review of the substance of corporate held interests parallel to that which occurred in the cases of vested rights protection for the interests held by individuals.

In the cases dealing with tax exemptions, for example, the Court increasingly relied upon legislative intention to determine whether a particular exemption had vested. Utilizing some rather strained interpretations of the wording of the exemption and noting the presence or absence of a reservation clause, the Court seemed to lurch from protecting the exemption to its fullest extent, protecting it only to a degree, and not protecting it at all.[310] In one

309. Shields v. Ohio, 95 U.S. 319 (1877); Peik v. Chicago & N.W. R.R. Co., 94 U.S. 164 (1877). Cooley argued similarly, that the doctrine of the police power places "charter-contracts" of corporations "upon the same footing with other legal rights and privileges of the citizen." T.M. COOLEY, *supra* note 46, at 576-77.

310. *See* B.F. WRIGHT, *supra* note 1, at 179-94. Wright could see no pattern to the cases.

case, a charter provision exempting a railroad from taxation "for ten years after completion" was held not to apply until the road was completed—the Court holding that the legislature would have said "until ten years after completion" had it meant to cover the period of construction.[311] The dissenters argued that the interpretation made no sense in that the exemption was needed more during construction than after its completion.[312] In another case, the Court protected against repeal a statute completely exempting a railroad from taxation for twenty-five years and providing that thereafter, no tax reducing dividends below eight percent would be laid.[313] Four dissenters argued that the exemption applied only for the first twenty-five years and that the latter provision constituted merely a "rule of taxation" liable to be changed at legislative discretion.[314] An exemption of "all property . . . owned by the corporation" was held to protect Northwestern University from taxation on land leased for income producing purposes,[315] but a similar exemption secured in the same year by the Chicago Seminary exempting "all property . . . owned by the seminary" was held not to apply to land held for investment and not used for immediate seminary purposes.[316] As used in the grants, three dissenting justices thought the term "seminary" synonymous with "corporation."[317] Finally, the Court applied reservation clauses to sustain laws repealing tax exemptions, except where the reservation clause was contained in a general statute and the particular statute granting the exemption provided that the reservation clause did not apply.[318]

The examples might be multiplied, but these few suffice to show that the examination of legislative intention had come completely to replace the inquiry into whether the exemption claimed to be protected against repeal was property, and hence a vested right. Further, the inquiry into legislative intent itself encountered many difficulties. After losing on whether the state had any power at all to "bargain away the right of any succeeding legislature to

311. Vicksburg, Shreveport & Pac. R.R. v. Dennis, 116 U.S. 665 (1886).
312. *Id.* at 671.
313. Mobile & Ohio R.R. v. Tennessee, 153 U.S. 486 (1894).
314. *Id.* at 507-08.
315. University v. People, 99 U.S. 309 (1878).
316. Chicago Theological Seminary v. Illinois, 188 U.S. 662 (1903).
317. *Id.* at 680.
318. Gulf Ship Is. R.R. v. Hewes, 183 U.S. 66 (1901).

levy taxes," Justice Miller expressed doubt as to the intelligibility of the inquiry into legislative intent:

> The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the State and other parties. . . .
>
> [The] doubts are increased when the terms of the statute relate to a matter which is . . . one of exclusive legislative cognizance, and which at the same time requires money or labor to be expended by individuals or corporations. In such cases, the legislature may be supposed to be merely exercising its power of regulating . . . in which case it could be modified from time to time as legislative discretion might determine; or it might be a contract . . . beyond the power of the State to impair. Statutes . . . of this dual character . . . require for their construction a critical examination of their terms, and of the circumstances under which they are created.[319]

Justice Waite was perhaps more forthright in discussing what was at stake in the "critical examination of . . . terms" and the "circumstances" surrounding the creation of the exemption.[320] In essence, Waite wrote, the Court had held that the legislature cannot "bargain away its whole power of taxation," but that it may "in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular."[321] The flexible and sometimes surprising approaches taken to the problem of construing the exemptions in the subsequent cases amounted to case-by-case review of the substance of the grant and the reasonableness of the reliance placed upon it in a particular instance.

A similar trend towards review of the substance of rights created by corporate franchise in place of the inquiry into whether the interests thus created were "property" is reflected in the cases dealing with grants of exclusive franchises. In *Butchers' Union Co. v. Crescent City Co.*, the Court sustained a provision of the Louisiana Constitution removing the monopolistic features of the charters of all existing corporations other than railroads.[322] The Butchers' Union, whose exclusive franchise had been upheld in the *Slaughterhouse Cases*,[323] thereby lost by charter amendment its

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319. New Jersey v. Yard, 95 U.S. 104, 114-15 (1877).
320. Stone v. Mississippi, 101 U.S. 814, 820-21 (1880).
321. *Id.* at 820.
322. 111 U.S. 746 (1884).
323. *Id.*; 83 U.S. (16 Wall.) 36 (1873); 77 U.S. (10 Wall.) 273 (1869).

protection from competition. The Court reasoned that although the Union's franchise had all the earmarks of a contract, the creation of an *irrepealable* exclusive franchise was void as an attempt to bargain away the inalienable police power.[324] Shortly thereafter, however, the Court protected against repeal, by the same provision of the Louisiana Constitution, the exclusive charters of a gas company and water works.[325] The Court reasoned that such public service corporations could be operated only by public franchise, and hence the legislature could, in these instances, contract away the power to adopt subsequently a policy in favor of competition.

The distinction between the chartered rights of public service and private corporations also seemed to underlie the Court's interpretation of provisions allowing for the fixing of rates. In the *Railroad Commission Cases* the Court said that nothing short of an express surrender of the power of "declaring what shall be deemed reasonable" would suffice to protect a railroad, whose charter permitted the fixing of reasonable rates, from subsequent rate regulation by a commission established for that purpose.[326] The Court also unanimously upheld a commission order fixing rates below the maximum permitted in a railroad's charter.[327] But a similar attempt by a city to reduce the maximum fare permitted in the franchise of a street railway chartered by a municipality was struck down.[328] And a charter created by a municipality providing for the rates to be charged by a public service corporation was also protected against repeal.[329] Since most public service companies were chartered by municipalities, the cases turned on whether the municipality was authorized by the state to make such a contract,[330] and finally whether the contract was in some sense reasonable. As Justice Sanford put it, it was permissible for a state to authorize a municipality "to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time."[331]

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324. *Id.* at 750-51.

325. New Orleans Water Works v. Rivers, 115 U.S. 674 (1885); New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885).

326. Stone v. Farmers Loan & Trust Co., 116 U.S. 307, 330 (1886).

327. Georgia Railroad & Banking Co. v. Smith, 128 U.S. 174 (1888).

328. Detroit v. Detroit Citizens' Street Ry., 184 U.S. 368 (1902).

329. St. Cloud Pub. Serv. Co. v. City of St. Cloud, 265 U.S. 352 (1924).

330. *See, e.g.*, Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908).

331. St. Cloud Pub. Serv. Co. v. City of St. Cloud, 265 U.S. at 355.

The Court, in *Pearsall v. Great Northern R.R. Co.*, reviewed many of these developments in the analysis of rights granted by corporate franchise.[332] At issue was a proposed agreement by which the Great Northern would assume practical control over the Northern Pacific, which operated a "parallel or competing line."[333] By its original charter (1856), the Great Northern had been granted authority to "connect with any railroad running in the same direction" and "to become part owner or lessee of any railroad" in the territory roughly bounded by St. Cloud, Minneapolis, and present day Duluth.[334] The charter also provided that it "may be amended by any subsequent legislative assembly" but only in a manner "not destroying the vested rights of said corporation."[335] A subsequent amendment (1865) gave it unrestricted authority to consolidate with any other railroad.[336] Two subsequent acts (1874, 1881) declared it unlawful for a railroad to "consolidate" or in "any way control" any other railroad corporation "owning or having under its control a parallel or competing line."[337]

As analyzed by the Court, the question was whether the unrestricted power to consolidate and combine granted in 1865 was a vested right within the meaning of the original charter, and hence protected against repeal by the acts of 1874 and 1881. In his opinion for the Court, Justice Brown undertook an exhaustive review of the cases, although conceding "that there are no authorities directly in point."[338] On one side were the cases following *Dartmouth College* holding that rights granted by a charter were vested "and hence that an act of the state legislature altering a charter in any material respect was unconstitutional and void."[339] On the other were such doctrines as strict construction of legislative grants and the inalienable police power which Brown noted "show . . . the general trend of opinion in this court upon the subject of corporate charters and vested rights."[340]

The analytic problem was how to treat "a bare unexecuted

332. 161 U.S. 646 (1896).
333. *Id.* at 650-52.
334. *Id.* at 668.
335. *Id.* at 669.
336. *Id.*
337. *Id.* at 652.
338. *Id.* at 668.
339. *Id.* at 660.
340. *Id.* at 664-68.

power to consolidate with other corporations."[341] Returning to the basic distinction between a vested right which "has become the property of some particular person" and an "expectant" right, Brown noted that it might be a different case "if this arrangement had been actually made and carried into effect."[342] The case would then concern a right "of property acquired by executed contracts" or "property legally acquired subsequent to such grant."[343] But on the strength of the corporate franchise cases, Brown noted precedent for protecting "all such rights as are necessary to the full and complete enjoyment of the original grant."[344] And more importantly, Brown was not prepared to rely on the traditional conception of an "unexecuted power" as reflecting an "expectant" and not a "property" right. For example, Brown argued that it might make sense to treat the power to combine with *non-competing* roads as a vested right even if it remained unexecuted:

> We do not deem it necessary to express an opinion . . . whether the legislature could wholly revoke the power it had given this company to extend its system by the construction or purchase of branch lines or feeders; since the possibility of an extension of the road, even to the Pacific coast, may have had an influence upon persons contemplating the purchase of its stock or securities, so that a right to do this might be said to have become vested.[345]

Conceiving as essentially arbitrary the boundary between "property" and "expectant" interests, Brown's analysis of whether the power to consolidate with competing roads had vested thus devolved into the question of the "reasonableness" of so holding in the particular case, as did the analysis of tax exemptions, exclusive franchises, and powers to establish rates. For example, he would not state that a power to consolidate with competitors could not be a vested right in an appropriate case: "Perhaps . . . it might not be beyond the competency of the legislature to authorize a railroad . . . to consolidate with a parallel or competing line, since cases may be imagined where it might be for the public welfare to permit such consolidation."[346] Nor would he say "that the legislature may not, in the exercise of a wise foresight, and for the purpose of

341. *Id.*
342. *Id.* at 672-73.
343. *Id.* at 673.
344. *Id.*
345. *Id.* at 675.
346. *Id.* at 675-76.

attracting capital to enterprise of doubtful profit, authorize the granting of monopolies for a limited time, irrevocable by a subsequent legislature."[347] But in the context of *this* case, Brown summed up: "[W]e think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong."[348] Having thus concluded, Brown then phrased the result in terms of legislative intention. The permission to consolidate with competing lines was "manifestly not within" the legislature's intent in granting "only a general authority to consolidate," because "[h]ad it occurred to the legislature at that time that these almost unlimited powers would be used to obtain the control of parallel and competing lines, and to stifle legitimate competition, doubtless a proviso would have been inserted to meet this possibility."[349]

The demise of the "property/expectancy" distinction in the analysis of legal interests created by corporate franchises was mirrored in the cases involving legal interests which by all previous accounts would have been "core" examples of vested rights. In *Illinois Central R.R. v. Illinois*, for example, the Court construed limits on the applicability of a statute that affirmed a grant "in fee" of the submerged Chicago waterfront.[350] Justice Field noted for the Court: "The State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[351] Here the right claimed to have vested was embodied in real property, but no attempt was made to square the decision with the earlier cases holding as vested in individuals the "interests or property of a nation."[352] Instead, the Court seemingly held that such grants must be reasonable, since it noted that small "parcels [that] can be disposed of without impairment of the public interest in what remains" might be held to vest.[353]

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347. *Id.* at 675.
348. *Id.*
349. *Id.* at 674, 676.
350. 146 U.S. 387 (1892).
351. *Id.* at 453.
352. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 143 (1810).
353. *Id.*

Also, in *Manigault v. Springs*, the Court sustained a statute permitting a person to erect a dam on the same creek on which a dam he previously erected had been removed pursuant to a contract with an abutting riparian owner.[354] The contract also provided that thereafter the creek would be maintained free of obstruction. For a unanimous Court, Justice Brown wrote:

> This power, which in its various ramifications is known as the police power . . . is paramount to any rights under contracts between individuals. Familiar instances of this are, where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic;—in other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good.[355]

Applying the doctrine of the police power to a contract between *private* individuals embodying an existing chose in action, and reconceiving that doctrine to limit not only rights created by corporate franchise, but also executed contracts made by corporations with "third parties," the Court permitted the repeal of the central legal interest protected as "property" under the contract clause. The holding "that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good"[356] demonstrates the extent to which the "property" boundary had collapsed and had become replaced by some conception of the substantive impact, on legislative power and individual rights, of holding that any existing legal interest had vested.

B. *A Note on Substantive Rights* [357]

The protracted breakdown of the logic of vested rights was accompanied by the reconceptualization of individual rights as substantive rights against the state. The relationship between the protection of vested and substantive rights is at this point difficult to discern. There was certainly no necessary inconsistency perceived between protecting substantive and vested rights, and many of the

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354. 199 U.S. 473 (1905).

355. *Id.* at 480.

356. *Id.*

357. For the brief description of substantive rights employed herein, I have relied upon Kennedy's "The Slaughterhouse Case," *in* The Rise and Fall of Classical Legal Thought: 1850-1940, *supra* note *.

late nineteenth century cases cited as examples of substantive due process (other than the freedom of contract cases) are decidedly ambiguous on whether the property right claimed is one defined by the standing law.[358] Of course, many, although by no means all, of the elements of substantive rights protection that would be adopted in cases such as *Lochner v. New York*[359] and *Adair v. United States*[360] were already present in the *Slaughterhouse* dissents.[361] The only purpose here, therefore, is to suggest some possible relationships between the "liberties" the late nineteenth century Court took with the earlier contract clause doctrines while formulating substantive due process.

For present purposes, the important feature of substantive due process as exemplified in the freedom of contract cases, was the Court's elevation of certain common law rules, such as those regulating "at will" employment contracts, to constitutional status as definitive of the liberty or property interest protected by the fourteenth amendment. At the same time, however, these rules somehow lost their character as rules; reconceived as an aspect of constitutionally protected "freedom," property and contract rights were viewed as protecting the entitlement of individuals to act *free of any legal regulation at all*, rather than to demand that expectations formed under the rules be protected against disappointment. The issue in those cases was thus conceived to be whether there could be regulation of the substantive right by legislation enacted

358. Part of the ambiguity seems attributable to the problem of having *federal* courts define substantive property rights. Without *any* reliance on the states' standing law, federal judicial protection for "property" could have provided an avenue for the review of all state common law property rules, especially in light of the Court's opinion in Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (holding that a state court decision in an eminent domain proceeding could be reviewed for its consistency with the (now federalized) requirement of just compensation). The Court thus discussed *both* local law and federal just compensation principles in determining the extent to which property had been taken. It is interesting that the problem of interference with the common law authority of state courts was not mentioned in *Chicago, Burlington & Quincy R.R.*, but was central to Holmes' dissent in Muhlker v. Harlem R.R., 197 U.S. 544 (1905), joined by Peckham, Fuller, and White. In that case, the claim to compensation was based on the contract clause and the theory that a property owner's rights had vested under a prior decision of the New York courts. In the substantive rights cases, the common law rules defining the parties' rights seem to disappear into the background; in the vested rights cases they are very much in evidence, as the source of the right claimed to have vested.

359. 198 U.S. 45 (1905).

360. 208 U.S. 161 (1908).

361. 83 U.S. (16 Wall.) 36, 83-130 (1873); 77 U.S. (10 Wall.) 273, 298-99 (1869).

under the police power or no regulation at all, rather than a choice between legal regulation by the legislature and legal regulation by the courts through the adoption of particular common law rules.

The plausibility of conceiving certain common law rules as definitive of constitutionally protected freedom is more a story of the transformation of private law categories than it is a story of the development of theories of rights against the state. But in some ways it drew upon the collapse of the vested right boundary doctrines and helped to bring those developments to a conclusion of sorts. Part of the development in legal thought which resulted in the Court's protecting "liberty of contract" entailed the abstraction of the property right and the reconceptualization of legal rights to include the remedies for their violation. Reconceived as aspects of a more general autonomy interest in acting free of legal rules, irrespective of whether those rules infringed upon existing property rights or altered mere remedies, rights against the state were recast as substantive limitations on the scope of legislative power. No distinction was drawn in *Lochner* and *Adair*, for example, between contract rights and remedies, and in *Adair* freedom of contract was both an aspect of personal liberty as well as a right of property. In helping to complete the transformation in the use of the categories of "legal right" and "property" in legal analysis, these cases reflected the accumulated critique of the concepts as boundary doctrines for vested rights *and*, unwittingly, presaged the argument of the theorists in the 1920's about the inevitable substantive judgment required to protect any legal interest as vested. To this extent, it seems to make sense to explain the ideas contributing to the plausibility of substantive due process as having worked in opposition to the protection of vested rights under the contract clause.

For example, there is an important sense in which cases such as *Manigault v. Springs*[362] and *Illinois Central Railroad v. Illinois*[363] are of a piece with *Lochner* and *Adair*. All these cases evidence the abstraction of the property right in legal analysis and the process by which the public/private distinction, initially applied only in the "legislative contract" cases to determine which rules vested legal rights, came to replace completely the property/

362. 199 U.S. 473 (1905).
363. 146 U.S. 387 (1892).

expectancy distinction in determining whether a legal interest was protected against legislative power. What is lacking in these cases is any discussion similar to that in the earlier cases about whether the right claimed qualified as a legal "thing."

A more complete description of the interaction between substantive and vested rights awaits a more detailed description of the changes in legal thought, particularly those in private law, that made possible the belief in the substantive right boundary doctrines. In any event, it seems unlikely that the constitutional significance of these changes can be comprehended without understanding how the substantive right came to displace the vested right in the analysis of constitutionally protected property and contract rights.

CONCLUSION

At the outset, it was noted that most explanations of the evolution of constitutional protection for individual rights in the nineteenth century attempt to account only for the ways in which the late nineteenth century Court expanded upon the protection of property and contract rights developed by the Marshall Court. Refocusing the inquiry on the ways in which the late nineteenth century Court critiqued and transformed the contract clause doctrines has provided an opportunity to rethink the validity of this emphasis and to question the explanation for the evolution of rights against the state that were premised upon it.

In particular, the explanations which rely upon the relative scope and intensity of beliefs in natural law, positivism, formalism, and instrumentalism assume a continuity in the understanding of the significance of those beliefs for the judicial role that cannot be supported. The *centrality* of the concept of vested rights in theories of either sort legitimating judicial protection of property and contract rights distinguishes early nineteenth century legal thinkers from their early twentieth century counterparts. The account for that shift has been cast in terms of the categories of legal thought constituting the logic of vested rights thinking and the collapse of the boundary doctrines which made that logic possible. In the history of those categories lies a more accurate explanation of the possibilities available to judges in the different eras, as well as an understanding of what they thought followed from their duty to decide the rights against the state cases according to "law."

The new explanation offered herein also questions the major premise underlying the traditional emphasis in American constitutional history on beliefs in the nature of law or styles of legal reasoning—that it is possible to understand the evolution of judicial protection for individual rights by reference to the necessary implications of changing commitments to opposing versions of liberal political theory. This premise is belied by the history of the contract clause. The categories of legal thought that helped convince earlier generations of legal thinkers of the legitimacy of judicial protection of rights against the state were those which seemed to avoid confrontation with the contradictions of liberal political theory which today seem pervasive and fundamental. The attempts to translate our constitutional past into support for modern constitutional theories therefore appears misguided.

That is not to say that constitutional history is devoid of lessons for the present. The finding that the history of these categories is the story of their disintegration and the resulting exposure of contradiction is itself significant. In particular, the critique of the vested right boundary doctrines renders unconvincing the conceptual gambit, limiting judicial protection for rights against the state to only vested rights, which helped legitimate judicial review for more than a century and which may inform the Court's recent contract clause decisions. In general, the failure of the concept of vested rights to generate a coherent boundary between legislative power and individual rights is a case study in the failure of liberal legalism to resolve the central problems posed by liberal political theory. Despite the failure to resolve these problems, the cases must be decided; but the belief that this process entails anything more certain than the identification of acts of justice or injustice seems an anachronism which somehow survives the recurring collapse of its major conceptual supports.